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# *IN THE SUPREME COURT OF THE UNITED STATES*

WASHINGTON STATE MEDICAL QUALITY ASSURANCE COMMISSION,

*PETITIONER,*

v.

BANG D. NGUYEN, M.D.,

*RESPONDENT.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Every state licenses physicians to practice medicine and imposes sanctions for violating standards of professional conduct, which may include revocation of the license. Thirty states, including Washington, have chosen preponderance of the evidence as the burden of proof necessary to establish a violation. This case presents the following question:

> Does the Due Process Clause of the Fourteenth Amendment require the states to apply the clear and convincing evidence standard of proof to revoke a license to practice medicine instead of the preponderance of the evidence standard they have chosen?

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## PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the Washington State Medical Quality Assurance Commission, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

## OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 144 Wash. 2d 516, 29 P.3d 689. App. at 1.[1] The opinion of the Washington Court of Appeals is reported at 99 Wash. App. 96, 994 P.2d 216. App. at 49. The Memorandum Order Affirming Commission, which was issued by the King County Superior Court, is unpublished. App. at 59. The Findings Of Fact, Conclusions Of Law And Final Order of the Medical Quality Assurance Commission is also unpublished. App. at 67.

## JURISDICTION

The judgment of the Washington Supreme Court was entered on August 23, 2001. App. at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The judgment is final for purposes of 28 U.S.C. § 1257(a), even though the Washington Supreme Court remanded the case to the Medical Quality Assurance Commission for further proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), identified four categories of judgments which would be treated as final, even though there were further state proceedings. The third

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[1] "App." refers to the separately bound Appendix To The Petition For A Writ Of Certiorari.

category is a judgment "where the federal claim has been finally decided . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case". *Cox Broad. Corp.*, 420 U.S. at 481. This case falls into the third category.

The Commission, by a preponderance of the evidence, held that Dr. Nguyen committed acts of unprofessional conduct and revoked his license to practice medicine. The Washington Supreme Court reversed. The court ruled that the Due Process Clause required clear and convincing evidence—not a preponderance of the evidence. This is a final decision on Dr. Nguyen's federal constitutional claim. The Washington Supreme Court remanded the case to the Commission "to conduct such further proceedings as are necessary to determine this matter by clear and convincing proof". *Nguyen v. Dep't of Health*, 144 Wash. 2d 516, 29 P.3d 689, 697 (2001) (*Nguyen* II), App. at 20. The Commission cannot obtain review of the Due Process question regardless of the outcome on remand. If the Commission establishes unprofessional conduct by clear and convincing evidence, the issue will be moot. If the Commission rules that the clear and convincing burden has not been met, it cannot obtain judicial review of the federal question. Under Washington law, a person can only seek judicial review of an agency order if he or she is aggrieved by it. Wash. Rev. Code § 34.05.530, App. at 210. The Commission cannot be aggrieved by its own order that Dr. Nguyen did not commit unprofessional conduct.

This case is similar to *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the state court ruled that the admission of certain evidence violated the defendant's constitutional rights and remanded for a new trial. This Court

held that the judgment was subject to review under 28 U.S.C. § 1257 stating: "In this case should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal." *Quarles*, 467 U.S. at 651 n.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law".

Wash. Admin. Code § 246-11-520 provides: "Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence." App. at 258.

Other statutes relevant to this case are set out in the appendix. These include laws governing the licensing and regulation of physicians, Wash. Rev. Code 18.71; the Uniform Disciplinary Act, Wash. Rev. Code 18.130; Washington Administrative Procedure Act, Wash. Rev. Code 34.05; and the Model Procedural Rules For Boards, Wash. Admin. Code 246-11. App. at 163-74; 175-204; 205-19; 220-265.

## STATEMENT

Every state in the United States licenses the practice of medicine and disciplines physicians for violating standards of professional conduct. Yet the states' regulatory regimes are not the same. States make different public policy choices to best serve the needs of their citizens. This case concerns

the choice of the standard of proof. A majority of states—including Washington—select the preponderance of the evidence standard to prove unprofessional conduct.[2] Other states have selected the clear and convincing evidence standard.[3] The question in this case is whether the Due Process Clause removes state choice and requires a single constitutional standard. We begin by briefly explaining Washington's regulatory regime and the disciplinary proceeding at issue in this case.

## 1. Regulation Of The Practice Of Medicine In Washington

Washington has a comprehensive regulatory system to license and discipline physicians. The state regulates physicians because "the health and well-being of the people of this state are of paramount importance [and because] the conduct of members of the medical profession . . . plays a vital role in preserving the health and well-being of the people of the state". Wash. Rev. Code § 18.71.003(2), (3), App. at 163-64. The regulation is carried out by the Washington State Medical Quality Assurance Commission. The Commission is appointed by the governor and consists of thirteen licensed physicians, two licensed physician assistants, and four members of the general public. Wash. Rev. Code § 18.71.015, App. at 165.

The Commission is responsible for issuing licenses to practice medicine. "No person may practice or represent himself or herself as practicing medicine without first having

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[2] *See* notes 7 & 8 *infra* p. 24, 26.

[3] *See* note 9 *infra* p. 26.

a valid license to do so." Wash. Rev. Code § 18.71.021, App. at 168. Applicants for a license must meet certain requirements such as graduation from a medical school approved by the Commission. Applicants must also pass an examination administered by the Commission. Wash. Rev. Code §§ 18.71.050-.055, .070, App. at 168-70, 171. Once issued, a license must be periodically renewed and, as part of this process, the Commission imposes a requirement for continuing medical education. Wash. Rev. Code § 18.71.080, App. at 171-72.

The Commission is also responsible for disciplining physicians. Wash. Rev. Code §§ 18.71.019, 18.130.040(2)(b)(ix), App. at 167-68, 177-78. A physician is subject to discipline for unprofessional conduct which includes, among other standards, commission of an act of moral turpitude relating to the practice of medicine, incompetence, negligence, and malpractice. Wash. Rev. Code § 18.130.180(1), (4), App. at 197-98. The Commission can choose from a wide range of sanctions but in selecting a sanction the Commission "must first consider what sanctions are necessary to protect or compensate the public". Wash. Rev. Code § 18.130.160, App. at 188. Possible sanctions include remedial education, required monitoring of the physician's practice, payment of a fine not to exceed $5,000 per violation, and suspension or revocation of the license to practice. Wash. Rev. Code § 18.130.160, App. at 187-88. If a license is suspended or revoked, the physician can petition the Commission for reinstatement after a period of time. Wash. Rev. Code § 18.130.150; App. at 186-87.

The procedures governing physician discipline are set out in the Uniform Disciplinary Act. Wash. Rev. Code 18.130, App. at 175-205. Any person can file a complaint

with the Commission charging a physician with unprofessional conduct. The Commission will investigate if it concludes that the complaint has merit. The Commission can also investigate without a formal complaint if it has reason to believe the physician may have engaged in unprofessional conduct. Wash. Rev. Code § 18.130.080, App. at 180-81. Prior to taking a written statement, the investigator must notify the physician in writing of the nature of the complaint, that the physician has a right to consult with an attorney, and that the statement may be used at the hearing. Wash. Rev. Code § 18.130.095(2)(a), App. at 183.

After the investigation, the Commission will issue a statement of charges if there is reason to believe there has been a violation. At this point, the physician can request a hearing. Wash. Rev. Code § 18.130.090, App. at 181-82. The hearing is governed by Washington's Administrative Procedure Act, Wash. Rev. Code 34.05. Wash. Rev. Code § 18.130.100, App. at 185.

In addition to the procedures in the Administrative Procedure Act, the Washington Legislature authorized the Secretary of the Washington State Department of Health in consultation with the Commission to adopt uniform procedural rules. Wash. Rev. Code § 18.130.095(1)(a), App. at 182. The preponderance of the evidence standard at issue in this case was adopted pursuant to this authority. Wash. Admin. Code § 246-11-520 provides that

> "the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a *preponderance of the evidence*." App. at 258 (emphasis added).

The uniform procedural rules provide that a physician may be represented by an attorney. Wash. Admin. Code § 246-11-070(1)(a), App. at 224. The rules also provide for interpreters, subpoenas, and the opportunity for discovery. Wash. Admin. Code §§ 246-11-210, -220, -370, App. at 229-33, 245-49.

At the conclusion of the hearing, the Commission must prepare findings of fact and conclusions of law. If the charge of unprofessional conduct is not sustained the findings must include a "public exoneration of the licensee". Wash. Rev. Code § 18.130.110(1), App. at 185. A physician aggrieved by the Commission order can obtain judicial review pursuant to the Administrative Procedure Act, and the final order must give notice of the opportunity for judicial review. Wash. Admin. Code § 246-11-600(1), (2), App. at 264.

**2. Procedural History**

In 1989, the Medical Disciplinary Board (the predecessor to the Commission) entered into an a Stipulation and Agreed Final Order with Dr. Nguyen. Dr. Nguyen agreed that he provided care to patients which fell below acceptable standards. App. at 72, ¶ 3.2. His license was indefinitely suspended but the suspension was stayed on the condition that Dr. Nguyen deliver care to patients which meets acceptable standards. Dr. Nguyen also agreed to have his practice supervised and monitored by other physicians. App. at 72-73, ¶¶ 3.3 to 3.4.

In 1994, another Statement of Charges was issued alleging violations of unprofessional conduct with 20 patients. The hearing on these charges was continued when Dr. Nguyen agreed to appear for an evaluation at the Colorado Personalized Education for Physicians Program (CPEP). App. at 68, ¶¶ 1.2 to 1.3. The CPEP assessment

took place in 1996 and demonstrated that Dr. Nguyen "practices medicine in a manner that creates an unreasonable risk that patients may be harmed". App. at 68-69, ¶ 1.4.

After the CPEP assessment, in October 1996 the Commission filed an Amended Statement of Charges. App. at 139-146. The Amended Statement of Charges alleged that Dr. Nguyen's treatment of 22 patients constituted "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." App. at 145, ¶ 4.1. The Amended Statement of Charges included the 20 patients listed in the 1994 Statement of Charges. App. 68-69, ¶ 1.14. Dr. Nguyen filed an answer denying most of the charges and requesting a hearing. App. at 147-50.

In December 1996, the Commission issued a new Statement of Charges against Dr. Nguyen. App. at 151-55. This Statement alleged that Dr. Nguyen had improper sexual conduct with three female patients—two of them minors. In his answer, Dr. Nguyen denied the charges and requested a hearing. App. at 157-61. He also requested a qualified interpreter be appointed who spoke Vietnamese.

In May and June 1997, the Commission held a six day hearing. The members of the Commission who heard the case included two physicians and two public members. A health law judge presided over the hearing. Dr. Nguyen was represented by an attorney and a certified court interpreter was present. App. at 67. The Commission heard testimony from fifteen witnesses and considered numerous exhibits. App. at 69-71. In September 1997, the Commission issued Findings of Fact, Conclusions of Law and Final Order. App. at 67-137. In weighing the evidence the Commission required the case to be proven by a preponderance of the evidence. App. at 127, ¶ 4.2. Based on this standard the Commission found Dr. Nguyen's conduct was

unprofessional—constituting incompetence, negligence, or malpractice. App. at 128, ¶ 4.4. The Commission also found unprofessional conduct consisting of abuse or sexual contact with a patient. App. at 129, ¶ 4.8. Some of the charges against Dr. Nguyen were not sustained and they were dismissed. App. at 129, ¶ 4.7; 130, ¶¶ 4.11-4.12; 136, ¶ 5.3.

In considering the appropriate penalty, the Commission "must first consider what sanctions are necessary to protect . . . the public". App. at 131, ¶ 4.15. Only then can the Commission consider other requirements "designed to rehabilitate the license holder". App. at 131, ¶ 4.15. The Commission concluded the proper sanction was to revoke Dr. Nguyen's license to practice medicine. App. at 136, ¶ 5.1. According to the Commission, although "provided many opportunities, [Dr. Nguyen] has failed to correct noted practice deficiencies. . . . [Dr. Nguyen] has had more than sufficient time and direction by the commission to improve his practice skills". App. at 133-34, ¶ 4.20. Although his license was revoked, the Order provides that Dr. Nguyen can reapply in five years. App. at 136, ¶ 5.1.

Dr. Nguyen petitioned for judicial review of the Commission's order arguing, among other issues, that the preponderance of the evidence standard violated the Due Process Clause. The superior court recognized that "there is a split throughout the country on whether or not a preponderance of the evidence standard is sufficient to revoke a doctor's license to practice medicine". App. at 60. The superior court concluded that the preponderance standard was consistent with Due Process in part because of the "strong substantive and procedural safeguards built into this state's structure for disciplining medical doctors". App. at 62.

Dr. Nguyen appealed the superior court decision to the Washington Court of Appeals. The court of appeals affirmed the superior court decision that the preponderance

standard did not violate the Due Process Clause. *Nguyen v. Dep't of Health*, 99 Wash. App. at 96, 994 P.2d 216 (1999) (*Nguyen* I), App. at 49-58. The court began by acknowledging that the "states that have addressed this issue are split". *Nguyen* I, 994 P.2d at 219, App. at 54. The court went on to apply the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the court found that the private interest was substantial. "The revocation of a medical license is not only an economic loss but also damaging to professional and personal reputation." *Nguyen* I, 994 P.2d at 220, App. at 55. Second, the court found that the "government's interest in protecting the public is weighty". *Id.* at 220, App. at 56. Finally, the court reviewed the procedural safeguards and concluded that "there is not a substantial risk of inaccurate findings or erroneous conclusions and that increasing the burden to clear and convincing would decrease the risk minimally". *Id.* at 221, App. at 57.

The Washington Supreme Court granted Dr. Nguyen's petition for discretionary review and reversed the court of appeals in a divided decision. *Nguyen v. Dep't of Health*, 144 Wash. 2d 516, 29 P.3d 689 (2001) (*Nguyen* II), App. at 1-47. The five-justice majority began by recognizing that: "State precedent from other jurisdictions is divided." *Nguyen* II, 29 P.3d at 691 & n.3, App. at 4 & n.3. The majority went on to analyze the three *Mathews* factors. First, the majority ruled that Dr. Nguyen had a "profound" interest in his medical license. *Nguyen* II, 29 P.3d at 694, App. at 11. The majority analogized the economic loss and stigma associated with license revocation to a "significant deprivation of liberty", similar to civil commitment in *Addington v. Texas*, 441 U.S. 418 (1979), or termination of parental rights in *Santosky v. Kramer*, 455 U.S. 745 (1982). *Nguyen* II, 29 P.2d at 694, App. at 12-13. Second, the

majority concluded that the preponderance standard created a high risk of an erroneous result. The majority reasoned that procedural safeguards cannot "substitute for . . . failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error". *Nguyen* II, 29 P.3d at 695, App. at 15 (internal quotation marks omitted). Finally, the majority evaluated the government's interest which it limited to "the efficient and economic administration of its affairs". *Id.* at 696, App. at 17 (internal quotation marks omitted). The majority concluded that this interest was not damaged because an "increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se". *Id.* at 696, App. at 18.

Three justices dissented in *Nguyen* II. The dissent began by observing that the "preponderance standard used in civil proceedings is generally applied in administrative hearings in Washington unless otherwise mandated by statute or due process principles". *Nguyen* II, 29 P.3d at 698, App. at 22. Turning to the *Mathews* factors, the dissent first concluded that "Dr. Nguyen's private interest is significantly affected". *Id.* at 702, App. at 32. But the dissent rejected the notion that Dr. Nguyen had a liberty interest in his license. According to the dissent, a "professional disciplinary process may implicate liberty interests as well, particularly when stigma may result from such proceedings. But a liberty interest in the sense of freedom from confinement is not implicated by professional discipline." *Id.* at 701, App. at 28. Second, the dissent found that the risk of error was minimal "given the numerous procedural protections afforded Dr. Nguyen". *Id.* at 705, App. at 37. The procedural protections listed by the dissent included an unbiased tribunal, notice of the proposed action and grounds asserted

for it, the right to a hearing, the right to call witnesses, the right to know the evidence against one, the right to have decisions based only on the evidence presented, the right to counsel, and the right of judicial review. *Id.* at 703-04, App. at 33-37. Finally, the dissent evaluated the government's interest and concluded that the "State's interest in regulating the practice of medicine and protecting the public from incompetent or unscrupulous practitioners is of vital significance to the State and its citizens". *Id.* at 707, App. at 42. In balancing these factors the dissent concluded that the preponderance standard did not violate Due Process. The dissent noted that this is the majority rule, although it acknowledged that some other states had held to the contrary. *Id.* at 707 n.10, App. at 43 n.10.

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition for four important reasons. First, there is a significant conflict among the states over the burden of proof required by the Due Process Clause in a medical disciplinary proceeding. The conflict represents a fundamental constitutional issue about the private interests at stake in a revocation proceeding and the government's interest in protecting the public. Second, the majority decision in *Nguyen* II conflicts with this Court's due process decisions by inflating a physician's interest in his or her license into a liberty interest equivalent to the loss of liberty involved in a civil commitment or the termination of parental rights. Third, the majority decision fails to recognize the state's vital interest in protecting its citizens from incompetent physicians—an interest this Court has long recognized. Finally, this case presents an important national question because all states regulate physicians and discipline them for unprofessional conduct. Most states have selected the preponderance of the evidence standard but some states choose clear and convincing evidence. The essence of federalism is that states must be free to develop a variety of

solutions to problems and not be forced into a common mold. A single constitutional standard removes that choice for all states, and this Court should decide whether the Due Process Clause prohibits the states from making their different public policy decisions about the proper burden of proof in a medical disciplinary proceeding.

### 1. There Is A Conflict Among The States Over The Burden Of Proof Required By The Due Process Clause In A Medical Disciplinary Proceeding

The Court should grant the petition to resolve a conflict among the states, which involves a substantial constitutional question. Courts in New Jersey, South Carolina, Iowa, Vermont, Wisconsin, Oregon, and New York, and the District of Columbia hold that the Due Process Clause is satisfied by the preponderance of the evidence standard, which is the traditional standard in civil administrative cases. These decisions include:

- *In re the Revocation of the License of Polk, M.D.*, 449 A.2d 7, 16-17 (N.J. 1982) ("we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment").

- *Anonymous v. State Bd. of Med. Examiners*, 496 S.E.2d 17, 20 (S.C. 1998) ("We find a preponderance of the evidence standard adequately protects a physician's property interest in his license.").

- *Eaves v. Bd. of Med. Examiners*, 467 N.W.2d 234, 237 (Iowa 1991) ("'A preponderance of the evidence is all that is required.' This standard is sufficient to satisfy due process.") (citations omitted).

- *In re Smith*, 730 A.2d 605, 612 (Vt. 1999) ("We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee.").

- *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wis. Ct. App. 1992) (the court rejected Gandhi's argument that "due process mandates proof of the allegations against a physician by at least clear and convincing evidence").

- *Gallant v. Bd. of Med. Examiners*, 974 P.2d 814, 819 (Or. Ct. App. 1999) ("Balancing the three factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case.").

- *Giffone v. De Buono*, 263 A.D.2d 713, 693 N.Y.S.2d 691, 694 (1999) ("We note that petitioner does argue that the burden of proof in license revocation proceedings should be 'clear and convincing' evidence of guilt before the Committee, as opposed to 'preponderance of the evidence'. This court has previously rejected this contention, and do [sic] so again here.") (citations omitted).

- *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) ("In short, we hold that the preponderance of the evidence test adequately protected Dr. Sherman's Fifth Amendment property interest in his license.").

On the other hand, in *Nguyen* II, Washington joins Oklahoma and Wyoming in reaching the contrary conclusion that the Due Process Clause requires clear and convincing evidence.

- *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996) ("As stated, constitutional due process requires the standard of proof in disciplinary proceedings against a person holding a professional license to be clear and convincing. The Board's rule does not comply with federal or state minimum constitutional due process requirements and is invalid.").[4]

- *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000) ("Due process requires that the Board prove its disciplinary cases by clear and convincing evidence.").[5]

The conflict among the states involves an important Due Process question—what is the required burden of proof to revoke a professional license? "[D]ue process is flexible and call[s] for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The proper burden of proof to be applied is traditionally a legislative policy decision and this Court has recognized "Congress' traditional powers to prescribe standards of proof". *Steadman v. Sec. & Exchange Comm'n*, 450 U.S. 91, 96 n.10 (1981) (internal punctuation omitted). States have similar legislative authority, and the burden of proof required may vary from state to state. "The essence

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[4] In *Johnson*, the court ruled that clear and convincing evidence was required by both the United States Constitution and the Oklahoma Constitution. *Johnson*, 913 P.2d at 1347.

[5] The decision in *Painter* was based on the Wyoming Constitution. However, the court's analysis was based on the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Painter*, 998 P.2d at 941. Nothing in the Court's analysis suggests that the Wyoming due process clause is stricter than the Due Process Clause in the Fourteenth Amendment. So it appears that the result would have been the same under the United States Constitution.

of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. So, state procedures, such as burden of proof, may "vary so long as they meet the constitutional minimum". *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court set out three factors to be considered in determining the appropriate process. Applying those factors to the issue of burden of proof, this Court held that the Due Process Clause requires clear and convincing evidence in two situations. The first is involuntary civil commitment. *Addington*, 441 U.S. at 428-31. The second is termination of parental rights. *Santosky v. Kramer*, 455 U.S. 745, 758-69 (1982). The question presented here is whether professional license revocation is a third situation requiring clear and convincing evidence.

The conflict between the states is based on a fundamental question of constitutional law about the interests at stake in a proceeding to discipline a physician. The split is well reflected in the majority and dissenting opinions in *Nguyen* II. The majority and dissent disagreed about the importance of Dr. Nguyen's private interest in his license and about the nature of the state's interest in protecting its citizens from incompetent physicians. The majority and dissent also disagreed about the risk of error in the proceeding. The difference between the majority and dissent in *Nguyen* II reflects the wider dispute among all the states.

The first factor is "the private interest that will be affected by the official action". *Mathews*, 424 U.S. at 335. In *Nguyen* II, the court described the property interest in the professional license as "profound", stating that the "loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation". *Nguyen* II, 29 P.3d at 694, App. at 11, 12. The court concluded that the

loss of professional reputation was equivalent to the personal loss of liberty suffered in involuntary civil commitment or termination of parental rights. *Nguyen* II, 29 P.3d at 694, App. at 12.

A majority of the courts take a different view. While recognizing that there is a substantial property interest in a professional license, these courts hold that that interest does not involve a fundamental right. "License revocation affects a property interest that is in no sense as serious as the liberty interests implicated in confinement or deportation." *Sherman*, 407 A.2d at 601. "The private interest of parents to care for their children is a substantial, constitutional right. . . . The private interest of a physician to practice his or her profession, on the other hand, is not a right; it is a privilege." *Gandhi*, 483 N.W.2d at 299-300.

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards". *Mathews*, 424 U.S. at 335. Washington law has numerous procedural safeguards, but *Nguyen* II held that these safeguards did not offset the "failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error". *Nguyen* II, 29 P.3d at 695, App. at 15 (internal quotation marks omitted). The court also pointed to the fact that the Commission investigated, monitored, and ultimately sat in judgment of Dr. Nguyen. *Nguyen* II, 29 P.3d at 695-96, App. at 16.

A majority of courts hold that procedural safeguards in the law ensure that there is little risk of erroneous deprivation. "The framework for the conduct of contested agency cases is designed to provide complete fairness, objectivity and impartiality in the administrative

adjudication." *In re Polk*, 449 A.2d at 16. "There are ample safeguards in Wisconsin to ensure due process in administrative hearings. These safeguards afford a realistic opportunity to prepare and meet the challenges posed in the proceeding." *Gandhi*, 483 N.W.2d at 300. These courts also pointed out that the disciplinary boards had particular expertise to understand the issues because they "relate to a profession, a specialty in which the parties, the witnesses and the members of the tribunals are all uniquely qualified and share a common expertise." *In re Polk*, 449 A.2d at 16. "[B]ecause the ultimate fact finders are mostly physicians, and by experience and training, therefore, are uniquely qualified to render a decision concerning this particular profession, the evidence and standards are likely to be well understood by the parties and the fact finders. As such, there is less chance of error." *Gandhi*, 483 N.W.2d at 300 (citation omitted).

The final *Mathews* factor is "the Government's interest". *Mathews*, 424 U.S. at 335. In *Nguyen* II, the court took a narrow view of the government's interest which it limited to "the efficient and economic administration of its affairs". *Nguyen* II, 29 P.3d at 696, App. at 17. The court held that the government's interest was satisfied because increasing the burden of proof to clear and convincing evidence would not "impose unacceptable fiscal and administrative burdens upon the government". *Nguyen* II, 29 P.3d at 696, App. at 18.

The position of a majority of states is that the government has a substantial interest in protecting the lives and health of its citizens. The "State has a substantial interest in the regulation and supervision of those who are licensed to practice medicine. In this capacity, the State acts as the guardian of the health and well-being of its citizens. It must be vigilant and competent to protect these interests fully." *In re Polk*, 449 A.2d at 15. "[T]he state has not only a strong

interest, but also an *obligation* to protect the health, safety and welfare of its citizens. We further agree with the trial court that the practice of medicine presents a prime example of a profession in which incompetency, wrongdoing or misconduct can threaten life itself." *Gandhi*, 483 N.W.2d at 299.

**2. The Washington Supreme Court's Decision Conflicts With This Court's Due Process Analysis Of The Private Interest Involved**

*Nguyen* II conflicts with this Court's due process analysis of the private interest involved. *Nguyen* II inflated the loss of Dr. Nguyen's license to practice medicine into "a 'significant deprivation of liberty' or 'stigma'", equivalent to civil commitment or termination of parental rights. *Nguyen* II, 29 P.3d at 694, App. at 12-13. The holding conflicts with this Court's analysis of the private interest and leads to the fundamentally flawed conclusion that medical disciplinary proceedings require clear and convincing evidence.

The majority opinion below points to two considerations to reach its conclusion that Dr. Nguyen has a liberty interest in his license to practice medicine sufficiently fundamental to require a more demanding burden of proof than that applied in the vast majority of civil cases—the economic value of the license and the stigma of losing it. According to *Nguyen* II:

> "Loss or suspension of the physician's license destroys his or her ability to practice medicine, diminishes the doctor's standing in both the medical and lay communities, and deprives the doctor of the benefit of a degree for which he or she has spent

countless hours and probably tens (if not hundreds) of thousands of dollars pursuing." *Nguyen* II, 29 P.2d at 694, App. at 12.

This Court has not viewed economic loss and the resulting stigma as giving rise to significant deprivation of liberty. And the Court has required clear and convincing evidence under the Due Process Clause only where there was a fundamental liberty interest at stake. *Addington* involved involuntary civil commitment—an actual deprivation of physical liberty. *Santosky* involved the termination of parental rights. The Court has recognized that the "interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court". *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

In contrast, the Court has rejected Due Process challenges to the legislative choice of preponderance of the evidence when there was no fundamental liberty interest at stake. In *Rivera v. Minnich*, 483 U.S. 574 (1987), the Court considered a state statute that required a preponderance of the evidence to establish paternity. The Court held that the state law did not violate the Due Process Clause. The Court distinguished the private interests involved in establishing paternity and terminating parental rights. According to the Court, the private interest at stake in paternity was economic—"avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child". *Rivera*, 483 U.S. at 580. Justice Brennan, in dissent, pointed out the "social stigma resulting from an adjudication of paternity". *Id.* at 585 (citing *County of Hennepin v. Brinkman*, 378 N.W.2d 790, 794 (Minn. 1985)). But this did not cause the majority to inflate the private interest in avoiding paternity to a fundamental liberty interest. In contrast to the economic interest in paternity, the Court

described parental rights as "an interest far more precious than any property right". *Id.* at 580.

*Vance v. Terrazas*, 444 U.S. 252 (1980), is another case where the Court held that the Due Process Clause did not require a clear and convincing burden of proof because it did not involve a fundamental liberty interest. *Vance* involved laws governing the loss of United States citizenship. Prior to 1961, Congress set out the procedure for expatriation but did not specify a standard of proof. In the absence of Congressional action, this Court applied the standard of clear and convincing evidence. *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958). After *Nishikawa*, Congress amended the law to require a preponderance of the evidence. *Vance*, 444 U.S. at 264-65. In *Vance*, this Court upheld the preponderance standard against a Due Process challenge. The Court recognized the importance of citizenship. Indeed, in *Schneiderman v. United States*, 320 U.S. 118, 122 (1943), an earlier case involving denaturalization, the Court described United States citizenship as "the highest hope of civilized man". Despite this fact, *Vance* went on to explain that "expatriation proceedings are civil in nature and do not threaten a loss of liberty". *Vance*, 444 U.S. at 266. Clearly, a person's interest in United States citizenship is greater than a person's interest in a professional license.

Thus, in its Due Process analysis, the Court has been careful to distinguish fundamental liberty interests from other important interests. This allows legislative bodies the flexibility to strike the proper balance between public and private interests in selecting the appropriate burden of proof when fundamental liberty interests are not at stake. The majority opinion below departs from these principles. It attempts to bootstrap an essentially economic interest into a liberty interest requiring special protection. This forecloses the legislative freedom to determine that a different standard of proof more appropriately balances the private economic

and public welfare interests that are implicated in a medical disciplinary proceeding. This conflicts with this Court's basic Due Process jurisprudence.

### 3. The Washington Supreme Court's Decision Fails To Recognize The State's Substantial Interest In Protecting The Lives And Health Of Its Citizens

Regulation of the practice of medicine is a traditional state function with its inception in colonial times. The first colonial act requiring a licensing examination was passed in 1760 by New York and applied only in New York City. It provided for a board of medical examiners who examined candidates for medical practice and provided penalties for practicing without a license. Robert C. Derbyshire, *Medical Licensure And Discipline In The United States* 3-4 (1969). This was followed in 1762 by a similar New Jersey statute applying to the entire colony. *Id.* Today every state in the United States regulates the practice of medicine. Edward H. Forgotson et. al., *Licensure of Physicians*, 1967 Wash. U. L.Q. 249 (1967).

Washington has regulated the practice of medicine since statehood. The Washington Constitution, which was adopted in 1889, explicitly recognized the importance of regulating the medical profession. Article XX, section 2 of the Washington Constitution provides: "The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines." App. at 163. In its first session in 1890, the Legislature adopted a law regulating the practice of medicine. 1889-90 Wash. Laws, p. 114. The law established a medical examining board to examine and license physicians. The law also provided for revocation of a license for unprofessional conduct after notice and a hearing. The Washington Supreme Court has recognized that the state regulates the practice of medicine, including the discipline of doctors, because "of the paramount importance of the health

and well-being of Washington citizens [and] the role of medical professionals in preserving this health and well-being". *Haley v. Med. Disciplinary Bd.*, 818 P.2d 1062, 1066 (Wash. 1991).

In 1889, this Court recognized the important state interests involved in regulating the medical profession in *Dent v. West Virginia*, 129 U.S. 114 (1889). *Dent* involved a challenge to a West Virginia law licensing doctors. The plaintiff was turned down for a license because the licensing board concluded that the "diploma he presented was insufficient". *Dent*, 129 U.S. at 125. The plaintiff argued that the denial of a license violated the Due Process Clause because it denied him the right to practice his profession. The Court rejected this argument recognizing that the "power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity". *Id.* at 122. The Court emphasized that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that [the physician] possesses the requisite qualifications". *Id.* at 122-23. The purpose was to protect society by excluding "from practice those who have not such a license, or who are found upon examination not to be fully qualified". *Id.* at 123. The Court concluded by stating: "No one has a right to practice medicine without having the necessary qualifications of learning and skill[.]" *Id.* at 123.

*Nguyen* II ignores the states' substantial interest in regulating the medical profession, which was recognized by the Court in *Dent*. Instead, the majority focuses upon the state's interest in "the efficient and economic administration of its affairs". *Nguyen* II, 29 P.3d at 696, App. at 17. Efficient and economic administration is clearly not the state's primary interest in regulating the medical profession.

## 4. The Petition Raises An Important National Question

The question of whether the Due Process Clause requires more than a preponderance of the evidence to revoke a professional license is an important national question. It affects all fifty states and the District of Columbia.[6] Each of these jurisdictions licenses the practice of medicine. Forgotson, 1967 Wash. U. L.Q. 249. And each should retain the flexibility to apply standards of proof that it determines appropriate in balancing the public and private interests implicated in medical licensing. Thirty states and the District of Columbia have chosen to employ the preponderance of evidence standard, either by statute, by administrative rule, or by common law.[7] In addition, Washington, Oklahoma, and

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[6] Moreover, at the federal level, the preponderance standard has been routinely applied to economic interests—even when there was associated stigma from the loss of a professional license or allegations of fraud. *See Steadman*, 450 U.S. at 94 (Congress applied the preponderance of evidence standard to antifraud provisions of federal securities law "permanently barring petitioner from associating with any investment adviser or affiliating with any registered investment company"); *Grogan v. Garner*, 498 U.S. 279, 280-81 (1991) (the Court applied the preponderance of evidence standard to prevent discharge in bankruptcy of "certain kinds of obligations, including those for money obtained by 'actual fraud'"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-88 (1983) (the Court applied the preponderance of evidence standard to a private action "to establish fraud under Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a)").

[7] Nine of these states have specifically established the preponderance standard in medical disciplinary hearings by statute or administrative rule. *See* Haw. Rev. Stat. § 91-10(5) (2001); Ky. Rev. Stat. Ann. § 13B.090(7) (2001); Mass. Gen. Laws ch. 112, § 5 (2001) (board may impose discipline "upon proof satisfactory to a majority of the board"); Mont. Code Ann. § 37-1-311 (2001); Nev. Rev. Stat. 630.352(1) (2001); N.Y. Pub. Health Law § 230(10)(f) (McKinney 2001); Tenn. Comp. R. & Regs. 1360-4-1.02(7) (2001); Vt. Stat. Ann. tit. 3 § 129(a), (b) (2000) (upheld on constitutional challenge by *In re Smith*, 730 A.2d 605, 613 (Vt. 1999)); Wis. Stat. Ann. § 440.20(3) (West 2001) (upheld on

constitutional challenge by *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wis. Ct. App. 1992)).

The remaining twenty-one states and the District of Columbia require a preponderance of evidence by judicial decision. *See Ferguson v. Hamrick*, 388 So. 2d 981, 983 (Ala. 1980) (using preponderance standard established in Ala. Code § 34-24-90 (1975), which was since repealed in 1981); *Ethridge v. Arizona Bd. of Nursing*, 796 P.2d 899, 904 (Ariz. 1989); *Johnson v. Arkansas Bd. of Examiners in Psychology*, 808 S.W.2d 766, 769 (Ark. 1991); *Swiller v. Comm'r of Pub. Health & Addiction Servs.*, No. HHD CV 95-0705601, 1995 WL 611754 (Conn. Super. Ct. Oct. 5, 1995) (chiropractor); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 600 (D.C. 1979) (upheld preponderance standard on constitutional challenge); *Georgia Bd. of Dentistry v. Pence*, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996) (upheld preponderance standard against claim that "reasonable doubt" should be used); *Eaves v. Bd. of Med. Examiners*, 467 N.W.2d 234, 237 (Iowa 1991) (upheld preponderance standard on constitutional challenge); *Thangavelu v. Dep't of Lic. & Reg.*, 386 N.W.2d 584, 589 (Mich. Ct. App. 1986); *In re Med. License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998); *Bever v. Bd. of Reg. for the Healing Arts*, No. WD 57880, 2001 WL 68307, at *4 (Mo. Ct. App. Jan. 30, 2001), *cause ordered transferred to Mo. S. Ct.* (Mar. 27, 2001), *reh'g denied* (Mar. 27, 2001); *Petition of Grimm, Ph.D.*, 635 A.2d 456, 463 (N.H. 1993) (upheld preponderance standard on constitutional challenge); *In re the Revocation of the License of Polk*, 449 A.2d 7, 17 (N.J. 1982) (upheld preponderance standard on constitutional challenge); *Foster v. Bd. of Dentistry*, 714 P.2d 580, 582 (N.M. 1986) (but clear and convincing used where fraud alleged); *In re Kincheloe*, 157 S.E.2d 833, 841 (N.C. 1967); *Kraft v. North Dakota Bd. of Nursing*, 631 N.W.2d 572, 576 (N.D. 2001); *Gallant v. Bd. of Med. Examiners*, 974 P.2d 814, 819 (Or. Ct. App. 1999) (upheld preponderance standard on constitutional challenge), *but see Bernard v. Oregon Bd. of Dental Examiners*, 465 P.2d 917 (Or. Ct. App. 1970) (due process requires clear and convincing standard when fraud or quasi-criminal activity alleged); *Shearer v. State Med. Bd.*, 97 N.E.2d 688, 691 (Ohio Ct. App. 1950), *but see* Ohio Rev. Code Ann. § 3719.121(A), (B) (West 2001) (clear and convincing standard for disciplinary action based on illegal drug use); *Starr v. State Bd. of Med.*, 720 A.2d 183, 191 (Pa. Cmwlth. Ct. 1998); *Anonymous v. State Bd. of Med. Examiners*, 496 S.E.2d 17, 20 (S.C. 1998) (upheld preponderance standard on constitutional challenge); *Texas Bd. of Med. Examiners v. Haynes*, 388 S.W.2d 258, 261 (Tex. Ct. App. 1965). Two states use a preponderance of the evidence standard, but qualify it with the higher burden of proof: In an attorney general opinion, Kansas deemed its

Wyoming authorized the preponderance standard by statute or administrative rule but the choice was invalidated by the judiciary on due process grounds.[8] Eleven states have chosen to strike a different balance and currently apply the clear and convincing standard.[9]

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standard of proof to be "a preponderance of evidence that is clear and convincing in nature". *See* Kan. Atty. Gen. Op. No. 95-54 (1995). Vermont requires a "clear preponderance" of evidence. *See Vance v. Fordham*, 671 P.2d 124, 128 (Utah 1983).

[8] *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996) (struck down administrative rule adopting preponderance standard on state and federal constitutional due process grounds); *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000) (declaring Wyo. Stat. Ann. § 33-26-407(b) (1999), requiring preponderance of evidence, unconstitutional on state equal protection grounds).

[9] Two of these states require "clear and convincing evidence" in medical disciplinary hearings by statute. *See* Fla. Stat. Ann. § 458.331(3), *amended by* 2001 Fla. Sess. Law Serv. ch. 2001-277, §§ 21, 76 (West); Md. Code Ann., Health Occ. § 14-405(b) (2000), *amended by* 2001 Md. Laws ch. 478 (H.B. 423) *and* 2001 Md. Laws ch. 479 (H.B. 424). *But see Rife v. Dep't of Prof'l Reg.*, 638 So. 2d 542, 543 (Fla. Dist. Ct. App. 1994) (court stated that higher standard not required to satisfy Due Process under United States Constitution).

The remaining nine states that use "clear and convincing evidence" or its equivalent do so under the common law. *See Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), *but see In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence); *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis); *Cooper v. Bd. of Prof'l Discipline*, 4 P.3d 561, 568 (Idaho 2000); *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) ("clearly and conclusively"); *Allen v. Louisiana Bd. of Dentistry*, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989); *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999); *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (struck down preponderance of evidence standard on equal protection grounds); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to preponderance standard in administrative hearings for license revocations because of important interest involved); *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111,

If the majority opinion below is correct, none of the states have a choice in the matter and more than twenty-five jurisdictions are applying a constitutionally impermissible burden of proof. This seems unlikely since this Court has often looked to the burden chosen by a majority of states to guide its decision on the issue. *Addington*, 441 U.S. at 431-32; *Rivera*, 483 U.S. at 577-78. Indeed, the number of the states applying the preponderance standard gives that standard a "powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment". *Rivera*, 483 U.S. at 578.

The fact that some states employ clear and convincing evidence does not undercut the preponderance standard. As the Court observed in *Addington*: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. States have the freedom to experiment and make different choices about procedure—including the appropriate burden of proof—"so long as they meet the constitutional minimum". *Id.* at 431.

Since the constitution limits the states' freedom to act, the courts should be cautions about establishing constitutional standards. The Court spoke to this point in *Washington v. Glucksberg*, 521 U.S. 702 (1997), considering whether there was a liberty interest in physician-assisted suicide. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. The Court cautioned that it must exercise care "lest the liberty protected by the Due Process Clause be subtly transformed into the policy

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121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license).

*preferences of the Members of this Court*". *Id.* Here, *Nguyen* II has placed the issue of burden of proof outside the arena of public debate. This is a fundamental constitutional question that requires this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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# *IN THE SUPREME COURT OF THE UNITED STATES*

WASHINGTON STATE MEDICAL QUALITY ASSURANCE COMMISSION,

*PETITIONER,*

v.

BANG D. NGUYEN, M.D.,

*RESPONDENT.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON*

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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| BANG D. NGUYEN,<br><br>Petitioner,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF HEALTH MEDICAL QUALITY ASSURANCE COMMISSION,<br><br>Respondent. | No. 68994-6<br><br>En Banc<br><br>Filed Aug. 23, 2001 |

SANDERS, J.

The issue here is whether the Due Process Clause of the United States Constitution requires proof by clear and convincing evidence in a medical disciplinary proceeding. We hold due process requires no less, reverse and remand.

Dr. Bang Duy Nguyen[1] is a Seattle medical doctor who began his private medical practice in 1984. From that time until September 1997 he was licensed to practice medicine by the State of Washington. In 1989 his license was suspended because the Medical Disciplinary Board (Board)[2] found his practice had fallen below acceptable professional standards. However, the suspension was stayed on several conditions, one of which being that Dr. Nguyen participate in a preceptor program under the tutelage of Dr. Burdick.

In 1991 Dr. Burdick recommended Dr. Nguyen's monitoring be reduced. The Board agreed Dr. Nguyen had made significant progress and accordingly reduced the level of preceptor review. Dr. Burdick continued to monitor Dr. Nguyen's practice until January 1996, even though he thought the charges against Dr. Nguyen were trivial and marginal.

In November 1994 the Medical Quality Assurance Commission (Commission) proffered a Statement of Charges against Dr. Nguyen. The hearing on those charges was postponed when the Commission issued an agreed order for him to be assessed by the Colorado Personalized Education for Physicians program (CPEP). During this time his license remained in effect.

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[1] Throughout the course of this litigation the petitioner has been referred to both as Dr. Bang and as Dr. Nguyen. We are mindful that in the Vietnamese tradition the surname is given first, thus Dr. Bang is proper. However since his counsel refers to him as such and since the case is so captioned we will refer to the petitioner as Dr. Nguyen.

[2] The Medical Disciplinary Board was the predecessor of the Medical Quality Assurance Commission.

An Amended Statement of Charges was issued against Dr. Nguyen by the Washington State Department of Health (Department) in October 1996 based in part on the CPEP evaluation. The Department further alleged Dr. Nguyen failed to comply with the 1989 Stay of Suspension agreement and rendered unprofessional care in the treatment of 22 patients. In December 1996 the Commission issued a Summary Suspension of Dr. Nguyen's license based on charges separate and apart from those which were currently pending. These new charges alleged Dr. Nguyen engaged in sexual misconduct with three of his patients.

On February 13, 1997 a hearing was held to set the limits of the Summary Suspension. The suspension was stayed pending a hearing on the merits of the case. All charges against Dr. Nguyen were then consolidated. A six day hearing was held in which Dr. Nguyen was represented by counsel. At the hearing the Commission found by a mere preponderance Dr. Nguyen had inappropriate sexual contact with three of his patients and was therefore unfit to practice medicine. His license was indefinitely revoked and he was prohibited from seeking relicensure for five years.

Dr. Nguyen sought review of the Commission's ruling in Superior Court, but the ruling was affirmed. *Bang Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n*, 99 Wash.App. 96, 100, 994 P.2d 216 (1999). He then sought review in the Court of Appeals for Division One, and again the Commission's ruling was affirmed. *Id.* We accepted review to determine whether the Commission applied the correct standard of proof when it decided the case on a mere preponderance.

The Uniform Disciplinary Act (UDA), which establishes the licensure and disciplinary procedures for health care professionals, gives the Department the authority to adopt rules necessary for carrying out its disciplinary functions. RCW 18.130.050(1). To that end the Department has adopted WAC 246-10-606 which states in part: "Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence."

Dr. Nguyen asserts he was denied his constitutional right to due process and equal protection when the Commission revoked his license to practice medicine based on a hearing which employed a mere preponderance of the evidence standard of proof. The UDA, RCW 18.130.100, states all hearings before the disciplinary authority are governed by the Administrative Procedure Act (APA). Under the APA, a reviewing court may grant relief from an administrative agency's ruling if, among other things, the order is in violation of the constitution either on its face or as applied. RCW 34.05.570(3). Consequently, our review of Dr. Nguyen's claim is appropriate and one upon which relief may be granted.

## ANALYSIS

A professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor. State precedent from other jurisdictions is divided.[3] How-

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[3] Some jurisdictions have asserted the mere preponderance standard is sufficient to satisfy due process: *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C.1979) (preponderance standard applies in medical and attorney disciplinary proceedings); *Rucker v. Mich. Bd. of Med.*, 138 Mich.App. 209, 360 N.W.2d 154 (1984) (preponderance standard in medical discipline); *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17

(1998) (preponderance standard applies); *In re Wang*, 441 N.W.2d 488 (Minn.1989) (preponderance standard); *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234 (Iowa 1991) (preponderance standard); *In re Grimm*, 138 N.H. 42, 635 A.2d 456 (1993) (preponderance); *Johnson v. Ark. Bd. of Exam'rs in Psychology*, 305 Ark. 451, 808 S.W.2d 766 (1991) (preponderance, same as in attorney discipline); *Gandhi v. State Med. Examining Bd.*, 168 Wis.2d 299, 483 N.W.2d 295 (1992) (preponderance for physician but clear and convincing for attorneys); *In re Polk*, 90 N.J. 550, 449 A.2d 7 (1982) (preponderance standard in medical disciplinary proceedings); *Gallant v. Bd. of Med. Exam'rs*, 159 Or.App. 175, 974 P.2d 814, 816 (1999) (due process was satisfied by the mere preponderance standard). *But see Bernard v. Bd. of Dental Exam'rs*, 2 Or.App. 22, 465 P.2d 917 (1970) (due process requires the clear and convincing standard in professional license revocations involving fraud or misrepresentation) and *Van Gordon v. Or. State Bd. of Dental Exam'rs*, 52 Or.App. 749, 629 P.2d 848 (1981) (a license revocation based on fraud requires proof by clear, satisfactory, and convincing evidence).

Notwithstanding, the more recent decisions trend toward requiring the higher standard of proof: *Painter v. Abels*, 998 P.2d 931 (Wyo.2000) (both due process and equal protection require clear and convincing standard in medical disciplinary proceedings); *Johnson v. Bd. of Governors*, 913 P.2d 1339 (Okla.1996) (due process requires clear and convincing standard in medical disciplinary proceeding as license revocation is quasi-criminal in nature); *Robinson v. State ex rel. Okla. State Bd. of Med. Licensure & Supervision*, 916 P.2d 1390 (Okla.1996) (clear and convincing standard required for professionally licensed persons); *Silva v. Superior Court*, 14 Cal.App.4th 562, 17 Cal.Rptr.2d 577 (1993) (clear and convincing standard required); *Ettinger v. Bd. of Med. Quality Assurance*, 135 Cal.App.3d 853, 185 Cal.Rptr. 601 (1982) (clear and convincing to a reasonable certainty required in medical licensure proceedings); *Rife v. Dep't of Prof'l Regulation*, 638 So.2d 542 (Fla.App.1994) (clear and convincing); *Ferris v. Turlington*, 510 So.2d 292 (Fla.1987) (clear and convincing in license revocations); *Bernard v. Bd. of Dental Exam'rs*, 2 Or.App. 22, 465 P.2d 917 (1970) (license revocation requires clear and convincing); *Sobel v. Bd. of Pharmacy*, 130 Or.App. 374, 882 P.2d 606 (1994) (clear and convincing standard has been required in license revocations, but preponderance applies in license application); *In re Zar*, 434 N.W.2d 598 (S.D.1989) (all professional license revocation proceedings require clear and convincing standard); *Miss. State Bd. of Nursing v. Wilson*, 624 So.2d 485 (1993) (where fraud or quasi-criminal activity is alleged the clear and convincing is required); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993) (medical discipline like attorney discipline requires clear and convincing standard);

ever, reason and applicable Supreme Court precedent dictate these grave concerns merit more than the minimal proof required to protect one from the risk of a mere, yet erroneous, money judgment.

We must not confuse the constitutional *right* to be applied with the *interest* to be protected. The Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of "life, liberty, or property, without due process of law." The "right" is due process, Dr. Nguyen's *interest* is his property,[4] his liberty,[5] or both.

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*Devous v. Wyo. State Bd. of Med. Exam'rs*, 845 P.2d 408 (Wyo.1993) (clear and convincing in medical disciplinary hearings).

See also Supreme Court cases applying higher standard where important individual interests are at issue: *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (due process requires clear and convincing standard in civil commitment as it is quasi-criminal in nature); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943) (denaturalization); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (termination of parental rights).

[4] Dr. Nguyen's professional license represents a property interest to which due process protections apply. *Johnson v. Bd. of Governors*, 913 P.2d 1339 (Okla.1996) (holding a professional license is a constitutionally protected interest in property); *see also Wash. State Med. Disciplinary Bd. v. Johnston*, 99 Wash.2d 466, 474, 663 P.2d 457 (1983) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution.").

[5] *See Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wash.2d 503, 510-11, 637 P.2d 940 (1981); *Johnston*, 99 Wash.2d at 474, 663 P.2d 457 (applying due process analysis to medical disciplinary hearings because they "deprive individuals of 'liberty' or 'property' interests"); *see also Painter*, 998 P.2d at 940 ("[P]ersons have a basic liberty interest in pursuing vocations.").

At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). A medical license is a constitutionally protected property interest which must be afforded due process. *Painter v. Abels,* 998 P.2d 931, 940 (Wyo.2000); *Johnson v. Bd. of Governors,* 913 P.2d 1339, 1345 (Okla.1996); *see also Wash. State Med. Disciplinary Bd. v. Johnston,* 99 Wash.2d 466, 474, 663 P.2d 457 (1983) ("A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature and, accordingly, entitled to the protections of due process.").

Our Constitution mandates that level of legal process due to reflect "respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 162, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). "[I]n the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell,* 256 U.S. 465, 477, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) (Brandeis, J., dissenting).

Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in

> the strength of the democratic faith which we profess.... It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

*Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 162-63, 71 S.Ct. 624 (Frankfurter, J., concurring).

The minimum evidentiary standard due a medical doctor in a professional disciplinary proceeding is most importantly based upon the nature of the interest at stake--the interest which is subject to erroneous deprivation if a mistake is made. The more important the interest, the less tolerant we are as a civilized society that it be erroneously deprived.

A process satisfies minimum constitutional requisites inherently due when it provides adequate safeguards to the citizen confronted by an action instigated against him by the state. Primary among these safeguards is the standard of proof. "The function of a standard of proof ... is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)).

*Addington* holds it is the nature and importance of the interest subject to the potentially erroneous deprivation which defines the constitutionally minimum standard of proof. That standard allocates the risk of error between the litigants: it is indicative of the relative importance attached to the ultimate decision. *Addington*, 441 U.S. at 423, 99 S.Ct. 1804. Thus, the more important the decision, the higher the burden of proof.

At the low end of the spectrum is the civil case involving a monetary dispute between private parties "[s]ince society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." *Id.* At the high end is the criminal case where the interests of the defendant are of such magnitude that the beyond-a-reasonable-doubt standard of proof is "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.*

*Addington* also recognized the constitutional necessity for an intermediate standard of proof employing some combination of the terms "clear," "cogent," "unequivocal," and/or "convincing," in circumstances where the interest is greater than a mere money judgment but less than a generic criminal proceeding. *Id.* at 424, 99 S.Ct. 1804. It recognized "some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof," *id.*, and concluded a higher standard of proof than a mere preponderance is constitutionally required to reflect society's concern with the consequence of a mistake the lower burden of proof necessarily makes more likely.

The intermediate clear preponderance standard is required in a variety of civil situations "to protect particularly important individual interests," that is, those interests more important than the interest against erroneous imposition of a mere money judgment. *Addington*, 441 U.S. at 424, 99 S.Ct. 1804. Examples of such proceedings include involuntary mental illness commitment, fraud, "some other quasi-criminal wrongdoing by the defendant" as well as the risk of having one's "reputation tarnished erroneously." *Id.* Medical disciplinary proceedings fit triply within this intermediate

category because they (1) involve much more than a mere money judgment, (2) are quasi- criminal, and (3) also potentially tarnish one's reputation.

*Addington* makes yet a further distinction: It observes while the interest of the individual may dictate a higher standard of proof to avoid erroneous deprivation, important interests of the state are likewise vindicated by the higher burden as they are potentially compromised by a lower burden of proof which inevitably increases the incidents of erroneous results. *Addington*, 441 U.S. at 425, 99 S.Ct. 1804. Aside from vindicating interests of accuracy in professional disciplinary proceedings, as Dean Roscoe Pound observed, "There is a public policy in maintaining the interests of individuals as well as one in upholding the agencies of government."[6]

It is important to focus on the nature of the interest at stake in the sense that the more important the interest, the more process is required. The interest of the individual is the primary concern; however, important interests of the state likewise merit a higher burden. A traffic infraction results in a fine. If a mistake is made the consequence is only money (and not much of that) or an erroneous dismissal. In either case the result is of no great consequence. However, charges of aggravated first degree murder may result in the death penalty on the one hand or a killer on the loose on the other. We, as a civilized society, will risk a mistake in the former but tolerate no wrongful conviction in the latter. So too with Dr. Nguyen: His professional license, his reputation, his ability to earn a living for his family are very important interests--much moreimportant than money alone.

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[6] Roscoe Pound, *The Rule of Law and the Modern Social Welfare State*, 7 Vand. L.Rev. 1, 12 (1953).

By the same token society also has the important dual interests that (1) Dr. Nguyen's standard of practice not fall below the acceptable minimum and (2) he not be erroneously deprived his license, as that would erroneously deprive the public access to and benefit from his services. Here *each* interest dictates a more exacting burden than mere preponderance.

The United States Supreme Court generally uses a three-part test to examine the minimum constitutional process due in a variety of procedural situations. In *Mathews,* 424 U.S. at 335, 96 S.Ct. 893, the Court considered whether a hearing *prior* to administrative termination of social security benefits was constitutionally required. The Court structured its consideration on three relevant factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used; and (3) the governmental interest in the added fiscal and administrative burden that additional process would entail. *Id. Mathews* did not consider the burden of proof; however, these factors have some uneven relevance and application to that issue as well. *Cf. Santosky v. Kramer,* 455 U.S. 745, 747, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (burden of proof in parental rights termination proceeding is constitutionally greater "than that necessary to award money damages in an ordinary civil action" based on *Mathews* factors).

**1. The First *Mathews* factor: Private Interests**

The individual's interest in a professional license is profound. Dr. Nguyen's professional license clearly represents a property interest to which due process protections apply. Moreover this court has recognized a doctor has a liberty interest in preserving his professional reputation that is entitled to protection under the Fourteenth

Amendment. *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wash.2d 503, 510-11, 637 P.2d 940 (1981). When facing a medical disciplinary board, "The defendant suffers the possible los[s] of a constitutionally protected property right, the loss of a livelihood, and the loss of a professional reputation." *Johnson*, 913 P.2d at 1346. "The loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation." *Id.* at 1345.

Loss or suspension of the physician's license destroys his or her ability to practice medicine, diminishes the doctor's standing in both the medical and lay communities, and deprives the doctor of the benefit of a degree for which he or she has spent countless hours and probably tens (if not hundreds) of thousands of dollars pursuing. The severity of such a penalty has led the United States Supreme Court to note that in such situations jurisdictions "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424, 99 S.Ct. 1804.

In contrast to the relatively negligible interest at stake in a civil proceeding which can only result in a money judgment properly determined by a mere evidentiary preponderance, the intermediate "clear and convincing" standard is typically used in civil cases "involving allegations of fraud or some other *quasi-criminal* wrongdoing by the defendant." *Id.* (emphasis added). The standard is appropriate when the individual interests at stake are " 'more substantial than mere loss of money.' " *Santosky*, 455 U.S. at 756, 102 S.Ct. 1388 (quoting *Addington*, 441 U.S. at 424, 99 S.Ct. 1804). The United States Supreme Court has deemed a higher level of certainty "necessary to preserve fundamental fairness in a variety of *government- initiated proceedings* that threaten the individual involved with 'a significant deprivation of liberty'

or 'stigma.' " *Id.* (emphasis added) (quoting *Addington*, 441 U.S. at 425-26, 99 S.Ct. 1804).

The Supreme Court could not have described the interest at stake for the doctor in a medical disciplinary proceeding with more clarity than its example in *Addington* of a quasi-criminal proceeding. This court has *expressly* held medical disciplinary proceedings are indeed "quasi-criminal." *In re Revocation of License of Kindschi*, 52 Wash.2d 8, 319 P.2d 824 (1958) described the unique nature of a medical disciplinary proceeding:

> It is characterized as civil, not criminal, in nature; yet it is *quasi criminal* in that it is for the protection of the public, and is brought because of alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose. It is not strictly adversary in nature. It is essentially a *special*, somewhat unique, statutory proceeding, in which the medical profession ... inquires into the conduct of a member of the profession and determines whether disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public.

*Id.* at 10-11, 319 P.2d 824 (first emphasis added). We recently reiterated medical discipline *is* quasi-criminal in *Johnston*, 99 Wash.2d 466, 663 P.2d 457.

*Johnston* and *Kindschi* are unquestionably the law of this jurisdiction.

These two cases use the term "quasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-

criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). If disbarment is quasi-criminal, so must be medical de-licensure. There is no distinction in principle. Other jurisdictions are in accord. Because of their quasi-criminal nature "the charges [against an attorney] must be sustained by convincing proof to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused." *Golden v. State Bar of Cal.*, 213 Cal. 237, 2 P.2d 325, 329 (1931). The same standard applies to professional discipline for judges. CJCRP 7. *In re Disciplinary Proceeding Against Kaiser*, 111 Wash.2d 275, 278, 759 P.2d 392 (1988). The Bar is required to prove attorney misconduct by no less than *clear and convincing* proof. *In re Disciplinary Proceeding Against Allotta*, 109 Wash.2d 787, 792, 748 P.2d 628 (1988). The Oregon Supreme Court summarizes the rule:

> Application of this intermediate standard permeates a line of United States Supreme Court decisions declaring that "clear and convincing" evidence is required in various quasi-criminal proceedings or where the proceedings threaten the individual involved with a significant deprivation of liberty or with a stigma.

*Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or. 390, 737 P.2d 595, 602 (1987).

Because of their unique nature, constitutional due process requires quasi-criminal proceedings--instigated by the state and involving a stigma more substantial than mere loss of money--be proved by the clear preponderance of evidence. *See Santosky*, 455 U.S. at 755, 102 S.Ct. 1388; *Addington*, 441 U.S. at 425-26, 99 S.Ct. 1804. It would be incongruous and contrary to both Washington and federal precedent to allow a quasi-criminal prosecution to proceed under the lowest standard of proof available.

## 2. The Second *Mathews* factor: Risk of Erroneous Deprivation

### a. Risk of Erroneous Result.

We must next consider whether the risk of erroneous result requires a heightened burden of proof in medical disciplinary cases. One might argue the procedure Dr. Nguyen received did not create an unacceptable risk of erroneous deprivation because he received a hearing before an administrative agency, he had notice of the charges against him, he had the opportunity to be heard, the right to call witnesses, the right to be represented by counsel, and the right to judicial review. The problem with this approach, however, is that none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimum burden of proof which is specifically designed "to impress the factfinder with the importance of the decision" and thereby reduce the chance of error. *Addington,* 441 U.S. at 427, 99 S.Ct. 1804.

Moreover, with respect to the risk of erroneous deprivation in this proceeding, there is little solace to be found in the availability of judicial review which is high on deference but low on correction of errors. RCW 34.05.570(3)(e) (A court shall grant relief from an agency order if it decides the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court."). Appellate review cannot cure an inadequate standard of proof. *Santosky,* 455 U.S. at 757 n. 9, 102 S.Ct. 1388. Appellate courts only determine whether factual findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law and judgment. *Green Thumb, Inc. v. Tiegs,* 45 Wash.App. 672, 676, 726 P.2d 1024 (1986).

Problems inherent in an interest-depriving procedure are thus only compounded when the possibilities for factual review are extremely limited. The risk of error is increased precisely because the opportunity for correcting error is minimal. Under the second *Mathews* factor, an increased risk of erroneous result is indicative of the fact that due process requires an increased standard of proof.

The Supreme Court of Wyoming recently visited this very issue holding in *Painter* that the preponderancestandard of proof in medical disciplinary hearings violates both due process and equal protection. *Painter*, 998 P.2d at 941-42. Analyzing the second prong of the *Mathews* test, *Painter* noted, "The risk of error is high in a proceeding seeking to revoke a medical license ... [and] the risk increases where the agency acts as investigator, prosecutor, and decision maker." *Id.* at 941 (citation omitted). That is essentially what happened here. The Commission investigated and monitored Dr. Nguyen's practice for several years, ordered him to be assessed by the Colorado Personalized Education for Physicians program, and ultimately sat in judgment of him as well.

**b. Subjective Standard of Conduct.**

The risk of erroneous deprivation is further aggravated when one recalls the ultimate standard of conduct the Commission applies is almost entirely subjective in nature: incompetency, negligence, malpractice, moral turpitude, dishonesty, and corruption were the claims upon which the Commission based its discipline of Dr. Nguyen. *Cf. Tellevik v. Real Property*, 120 Wash.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992) (ex parte probable cause hearing in a civil forfeiture proceeding sufficient to meet minimal due process because the seizure determination was based on "an objective" standard arising from " 'uncomplicated matters that lend

themselves to documentary proof.' ") *Id.* at 86, 838 P.2d 111, 845 P.2d 1325 (quoting *Connecticut v. Doehr*, 501 U.S. 1, 14, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991)). It is difficult to imagine a more subjective and relative standard than that applied in a medical discipline proceeding where the minimum standard of care is often determined by opinion, and necessarily so.

Additionally, as the Court in *Santosky* noted, an elevated standard of proof militates against the possibility that the fact finder might deprive an individual of his license based solely on a few isolated incidents of unusual conduct. *Addington*, 441 U.S. at 427, 99 S.Ct. 1804; *Santosky*, 455 U.S. at 764, 102 S.Ct. 1388. Such concern is especially applicable to medical discipline where the charges stem from what could be an anomaly in an otherwise exemplary career.

In summary, the administrative procedure, in addition to the subjective standard of care, increases the risk of error and in itself justifies a heightened burden of proof under the second *Mathews* factor.

**3. The Third *Mathews* Factor: Government Interests**

The last factor called to our attention by *Mathews* is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335, 96 S.Ct. 893. As one can quickly discern from a simple reading of the text, this requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed. As the Supreme Judicial Court of Massachusetts phrased it, the last factor examines "the government's interest in the efficient and economic administration of its affairs." *Thompson v. Commonwealth*,

386 Mass. 811, 438 N.E.2d 33, 37 (1982). This requirement does not relate to the interest which the government attempts to vindicate through the procedure itself.

Does requiring proof by a clear preponderance in a medical disciplinary proceeding somehow impose unacceptable fiscal and administrative burdens upon the government? Obviously not. An increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se. In *Mathews*, for example, this factor was important in the context of the recipient's claim that he should be afforded an opportunity for an evidentiary hearing *prior* to termination of social security disability benefit payments. *Mathews* concluded a prior evidentiary hearing was not required in that circumstance in part because of the incremental cost resulting from the increased number of hearings as well as the expense of providing benefits to ineligible recipients pending final decision. *Mathews*, 424 U.S. at 347, 96 S.Ct. 893. Increased cost is clearly not a fact or concern here.

Even if we were to consider the government "interest" in a reliable substantive outcome as part of our *Mathews* analysis, the matter would still be resolved in favor of Dr. Nguyen. The government's interests are only furthered by medical disciplinary proceedings which reach an accurate and reliable result. *Cf. Addington*, 441 U.S. at 426, 99 S.Ct. 1804 ("Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."); *Santosky*, 455 U.S. at 766-68, 102 S.Ct. 1388 (a standard of proof more strict than preponderance of the evidence is consistent with promoting the state's interest in a parental rights termination proceeding).

The state asserts the Commission serves the societal interest of protecting the public from physicians who abuse their patients or who are not competent to practice. Answer to Pet. for Review at 9. This it undoubtedly does. One of the purposes for creating the Commission was "[b]ecause the health and well-being of the people of this state are of paramount importance." RCW 18.71.003. Prior to the creation of the Commission,[7] this court noted a medical disciplinary authority performs the special function of "protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public." *Kindschi*, 52 Wash.2d at 11, 319 P.2d 824.

However it is difficult to see how either of these goals is furthered by the Commission's employing a low standard of proof which results in a greater number of erroneous license revocations than would occur if it, at no additional cost or burden, applied a higher standard. It makes little sense to contend either the health of the public or its confidence in the medical profession is bolstered by the erroneous de-licensure of qualified physicians. The public is ultimately dependent upon the provision of a physician's services, not their elimination.

In the final analysis, there are neither facts, reasons, nor argumentsto support the proposition that the Commission cannot realize its purpose by using a higher standard of proof.

## CONCLUSION

The interest of the medical practitioner in a professional disciplinary proceeding is obviously much greater than that which would be implicated by the mistaken rendition of a

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[7] *See supra* n. 2.

mere money judgment against him. It is much more than the loss of a specific job. It involves the professional's substantial interest to practice within his profession, his reputation, his livelihood, and his financial and emotional future. That the public has an interest in the competent provision of health care services lends even greater importance to the assurance against erroneous deprivation which a higher standard would promote, as ultimately the public is dependent upon the provision of such services, not their elimination. An inadequate standard of proof increases the risk of erroneous deprivation and, therefore, requires recognition, as so many other courts have, that the constitutional minimum standard of proof in a professional disciplinary proceeding for a medical doctor must be something more than a mere preponderance.

Because our determination concerning Dr. Nguyen's due process argument requires reversal, we need not determine his equal protection claim.

The decisions of the Court of Appeals, the Superior Court, and the Medical Quality Assurance Commission are vacated. The matter is remanded to the Commission to conduct such further proceedings as are necessary to determine this matter by clear and convincing proof. Costs on appeal are awarded to petitioner.

ALEXANDER, C.J., SMITH, JOHNSON, and MADSEN, JJ. concur.

**IRELAND, J. (dissenting).**

We are asked in this case to decide if the Medical Quality Assurance Commission (Commission) denied due process to a physician subject to discipline when it employed a preponderance of the evidence standard as the burden of proof for factual determinations. Contrary to the majority, we submit the preponderance standard adopted by the Department of Health (Department) by regulation for all health care professionals subject to the Uniform Disciplinary Act, chapter 18.130 RCW, does not violate principles of due process or equal protection. We would affirm the Commission's findings and revocation of Dr. Bang Nguyen's[1] license to practice medicine.

## ANALYSIS

The Uniform Disciplinary Act (Act)[2] establishes the licensure and disciplinary procedures for all health care professionals in Washington. It provides a broad array of due process guarantees for professionals subject to discipline including notice of charges, a right to a hearing on any charges with examination and cross-examination of witnesses, the right to counsel, and judicial review. The Act gives the Department the authority to adopt rules necessary for carrying out its disciplinary functions. RCW 18.130.050(1). To that end the Department has adopted

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[1] In the Vietnamese tradition, family names are listed first. While it would be culturally appropriate to refer to the petitioner as Dr. Bang, we follow the usage of the majority and refer to him as Dr. Nguyen, to avoid confusion.

[2] The statute creating the Commission specifically adopts the Act. RCW 18.71.019. The Act, in turn, adopts the procedures of the Administrative Procedure Act (APA), chapter 34.05 RCW, as to license revocation. RCW 18.130.100.

WAC 246-11-520 which states in part: "[e]xcept as otherwise provided by statute, the burden in all cases is a preponderance of the evidence." Thus, the preponderance standard was applied by the Commission in these proceedings pursuant to a regulation validly adopted under the grant of such authority by the Legislature in the Act.

The preponderance standard used in civil proceedings is generally applied in administrative hearings in Washington unless otherwise mandated by statute or due process principles. *Thompson v. Dep't of Licensing,* 138 Wash.2d 783, 797, 982 P.2d 601 (1999). *See also Steadman v. Sec. & Exch. Comm'n,* 450 U.S. 91, 103-04, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) (upholding the Security and Exchange Commission's (SEC) use of preponderance of evidence standard in part because of the agency's long-standing employment of that standard in disciplinary proceedings even where the statute did not specify a specific burden of proof).

Upon appeal, findings of fact under the Administrative Procedure Act (APA), chapter 34.05 RCW, are reviewed under a substantial evidence test: findings must be supported "by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). *Valentine v. Dep't of Licensing,* 77 Wash.App. 838, 894 P.2d 1352, *review denied,* 127 Wash.2d 1020, 904 P.2d 300 (1995). Substantial evidence is " 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.' " *Thieu Lenh Nghiem v. State,* 73 Wash.App. 405, 412, 869 P.2d 1086 (1994) (quoting *Olmstead v. Dep't of Health,* 61 Wash.App. 888, 893, 812 P.2d 527 (1991)).

Dr. Nguyen, however, asserts he was denied his constitutional right to due process and equal protection when the Commission revoked his license to practice medicine

based on findings established by the preponderance of the evidence standard of proof. He contends the clear, cogent, and convincing standard of proof is constitutionally mandated. RCW 34.05.570(3).[3]

## A. DUE PROCESS

In analyzing the necessary standard of proof to satisfy due process, it is worthwhile to recall basic due process principles. In the face of a contention that statutes or administrative regulations implementing them are unconstitutional, such regulations and statutes are generally presumed to be constitutional. *Keene v. Bd. of Accountancy,* 77 Wash.App. 849, 854, 894 P.2d 582, *review denied,* 127 Wash.2d 1020, 904 P.2d 300 (1995). Moreover, it is well settled the courts will not declare a statute unconstitutional, unless its conflict with the constitution is plain beyond a reasonable doubt. *Island County v. State,* 135 Wash.2d 141, 146-47, 955 P.2d 377 (1998). Thus, we must not lightly declare unconstitutional the Legislature's selection of the preponderance standard of proof.

The essence of due process is notice and the opportunity to be heard. *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914); *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *See also In re Marriage of McLean,* 132 Wash.2d 301, 308, 937 P.2d 602 (1997); *State v. Rogers,* 127 Wash.2d 270, 898 P.2d 294 (1995). Indeed, Dr. Nguyen has an interest in his professional license entitling him to due process before that license can be suspended or revoked. We

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[3] The APA provides for judicial review of an agency adjudicative order where (a) the order violates the constitution, (b) the order is outside the agency's authority, (c) the agency engaged in unlawful procedure, (d) the agency erroneously interpreted or applied the law, or (e) the order is not supported by substantial evidence. RCW 34.05.570(3).

have often noted the protections of due process apply to medical disciplinary proceedings. *See, e.g., Haley v. Med. Disciplinary Bd.*, 117 Wash.2d 720, 739, 818 P.2d 1062 (1991). As the United States Supreme Court has stated:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, *subject only to such restrictions as are imposed upon all persons of like age, sex and condition.* This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution.... *But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society.*

*Dent v. West Virginia*, 129 U.S. 114, 121-22, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (emphasis added).

For purposes of due process, the standard of proof indicates a constitutional policy regarding the tolerable level of risk of error for factual conclusions in a particular type of decision. *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The United States Supreme Court set out an analytical protocol for determining such questions in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), where the Court discussed the quantum of process due Social Security disability benefits recipients before the government could terminate the payments. The Court established a three- part test requiring an examination and balancing of: (1) the nature of the private interest affected by the proceeding; (2) the countervailing governmental interest to be furthered by the proceeding; and (3) the risk of error in

the ultimate determination created by the use of the particular burden of proof. *Id.* at 335, 96 S.Ct. 893. We first adopted the *Mathews* protocol in *In re Pers. Restraint Petition of Sinka,* 92 Wash.2d 555, 565, 599 P.2d 1275 (1979), and have employed it in numerous cases since then. *See, e.g., Soundgarden v. Eikenberry,* 123 Wash.2d 750, 768, 871 P.2d 1050, *cert. denied,* 513 U.S. 1056, 115 S.Ct. 663, 130 L.Ed.2d 598 (1994); *Sherman v. State,* 128 Wash.2d 164, 184, 905 P.2d 355 (1995). Although *Mathews* concerned the need for an evidentiary hearing prior to termination of benefits and this case addresses the standard of proof, *Mathews* applies to the analysis of the burden of proof in disciplinary proceedings; *Mathews* provides what is fundamentally a balancing test with no one element controlling. We turn to the application of that test under these facts.

**1. The Private Interest Affected**

There is little question Dr. Nguyen's professional license represents a property interest[4] to which due process protections apply. *Johnson v. Bd. of Governors,* 913 P.2d 1339, 1345 (Okla.1996). Dr. Nguyen obtained his license to practice medicine from the State of Washington when he fulfilled the statutory requirements for a license. However, such a license is entirely defeasible, after a hearing, for a host of statutory reasons pertaining to such matters as incompetent or dishonest practices. As we said in *State v. Hazzard,* 139 Wash. 487, 493-94, 247 P. 957 (1926):

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[4] While a professional license is a property interest, it does not have the usual attributes of either personal or real property. It does not have an exchange value or any objective transferable value on an open market. It is individual to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. It may not be acquired by the expenditure of money.

Appellant urges that the license to practice is a property right, and cites our holding in *State ex rel. Fryberg v. Maybury,* 134 Wash. 641, 236 Pac. 566 [(1925)], where, under the authority of *Hewitt v. Board of Medical Examiners,* 148 Cal. 590, 84 Pac. 39 [(1906)], we said that the right to practice is "a valuable property right." But the expression was not used in the sense in which those words are sought to be here construed by appellant. In that case it was sought to revoke, without cause, a license regularly issued and we held that the right to continue to hold it was such a property right that it could not be taken away except for cause. It was not intended to hold that it was such a property right, that it could not be taken away by reason of the failure of the holder thereof to maintain that good character required by law of the holder thereof. The right to hold a public office is also in a sense a valuable property right, but it has almost universally been held that the holder thereof may be removed upon conviction of crime, and that a pardon does not restore the former holder thereto. *State ex rel. Webb v. Parks,* 122 Tenn. 230, 122 S.W. 977 [(1909)]; *State v. Carson,* 27 Ark. 469 [(1872)].

There is a wide distinction between the right which one, whether felon or free, has to hold his own property against the world and deny even the state the right to take it from him without compensation therefor, and that other right to practice a profession which demands peculiar qualifications in order to protect the public, and requires a license. As to the latter, there can be, strictly speaking, no inherent right thereto, if considered apart from the question of qualifications. One qualified in all respects has a right to a license, but one unqualified has no right whatever.

*See also Dent v. West Virginia,* 129 U.S. at 121-22, 9 S.Ct. 231 (professional license is a property interest different from real or personal property).

Dr. Nguyen implies his license may be a fundamental right,[5] citing *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), and *Addington*, to support his conclusion clear and convincing evidence is the constitutionally required standard of proof in medical disciplinary hearings. Both *Santosky* and *Addington* involved rights more *fundamental* than a professional license.

*Santosky* involved the termination of parental rights, holding that due process requires clear and convincing evidence in a proceeding to permanently terminate such rights. 455 U.S. at 768, 102 S.Ct. 1388. Parental rights are fundamental, constitutional rights. *In re Welfare of Luscier*, 84 Wash.2d 135, 137, 524 P.2d 906 (1974) (parental rights are fundamental rights requiring for deprivation "full panoply of due process safeguards"). They are not rights the State may award or deprive one of depending on the fulfillment and maintenance of certain qualifications. By contrast, the right to practice medicine in Washington requires graduation from

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[5] Courts have recognized various fundamental rights including the right to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the right to vote, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); the right of association, *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); the right of access to the courts, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); the right of natural parents with respect to termination proceedings, *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); the right to privacy, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); the right of free exercise of religion, *Johnson v. Robison*, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); the right to travel, *Jones v. Helms*, 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981); the right of natural parents to make decisions as to the care, custody, and management of their children, *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); and the right to decide regarding artificial medical life support procedures, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

an approved medical school, completion of two years of acceptable postgraduate medical training, good moral character, and the physical and mental ability to practice medicine. RCW 18.71.050. All licensed physicians must fulfill continuing education requirements to retain their licenses. RCW 18.71.080. There are no written tests required to become a parent, and no continuing education requirements. Unlike parenting, there is no fundamental, constitutional right to practice medicine free of state regulation.

*Addington*, which was followed in *Santosky*, involved involuntary commitment and required clear and convincing evidence to support such commitments. 441 U.S. at 432-33, 99 S.Ct. 1804. Personal liberty may be a fundamental right. *Fay v. Noia*, 372 U.S. 391, 401, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) (discussing history of habeas corpus), *overruled in part on other grounds sub nom. Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *See also State ex rel. T.B. v. CPC Fairfax Hosp.*, 129 Wash.2d 439, 452, 918 P.2d 497 (1996) ("involuntary commitment represents 'a massive curtailment of liberty' ") (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)).

A professional disciplinary process may implicate liberty interests as well, particularly when stigma may result from such proceedings. But a liberty interest in the sense of freedom from confinement is not implicated by professional discipline.[6]

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[6] In *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wash.2d 503, 510, 637 P.2d 940 (1981), we held a liberty interest could be present if a public employee's integrity, honor, or good name was called into question by their dismissal from public employment. *See also Giles v. Dep't of Soc. & Health Servs.*, 90 Wash.2d 457, 461, 583 P.2d 1213 (1978). In *Ritter*, we held the physician was entitled to due

Dr. Nguyen argues vigorously he has a liberty interest at stake here because of the stigma associated with allegations of sexual misconduct. However, he fails to distinguish this case from federal precedent. *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1164-65, 47 L.Ed.2d 405 (1976), establishes the opposite: "[W]e hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Accord Siegert v. Gilley*, 500 U.S. 226, 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (syllabus), 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) ("[U]nder *Paul v. Davis* ... injury to reputation by itself is not a protected 'liberty' interest."). "Stigma-plus" is required to establish a liberty interest. We agree with Dr. Nguyen that a professional license is a significant property interest with overtones of a liberty interest where the professional's reputation is at stake, but the authorities cited do not establish that it is such a fundamental interest that a clear and convincing standard of proof is invariably required for its deprivation.

Dr. Nguyen also asserts the Commission's process is "quasi-criminal" meriting a higher burden of proof, citing *In re Revocation of License of Kindschi*, 52 Wash.2d 8, 10, 319 P.2d 824 (1958). The use of the "quasi- criminal" language in *Kindschi* is unhelpful because we must still decide the

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process to protect his property and liberty interests, but we ultimately *upheld* his loss of hospital staff privileges.

The Court's discernment of a liberty interest in *Ritter* and *Giles* may be explained in part by the unique facts of those cases. In *Giles*, we noted there is no constitutional property interest in public employment. *Giles*, 90 Wash.2d at 461, 583 P.2d 1213. In *Ritter*, we similarly found no property interest in hospital staff privileges. *Ritter*, 96 Wash.2d at 509-10, 637 P.2d 940. In this case, Dr. Nguyen had a property interest in his medical license.

standard of proof due process compels, regardless of the adjective we might select to characterize the nature of the disciplinary proceeding. Merely designating the proceeding as quasi-criminal does nothing to inform that decision. *Kindschi* does not address the applicable standard of proof. Moreover, our cases repeatedly state medical disciplinary proceedings are not of a penal nature. We said in *Kindschi* the purposes of medical disciplinary action are to protect the public and the standing of the medical profession in the eyes of the public. *Kindschi,* 52 Wash.2d at 11, 319 P.2d 824. We repeated this formulation in both *Haley v. Med. Disciplinary Bd.*, 117 Wash.2d at 743, 818 P.2d 1062; and *Heinmiller v. Dep't of Health,* 127 Wash.2d 595, 605, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied,* 518 U.S. 1006, 116 S.Ct. 2526, 135 L.Ed.2d 1051 (1996). Protection of the public is a remedial, not a penal, goal, and although punishment might be the inevitable consequence of a disciplinary action, punishment is never the goal. *In re Discipline Proceeding Against Vetter,* 104 Wash.2d 779, 792, 711 P.2d 284 (1985).

Dr. Nguyen goes so far as to suggest that *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323, compels the conclusion that if something more important than mere money is involved, a higher standard of proof is always required. *Addington* does not go that far; it merely states that when there are allegations of fraud or quasi-criminal wrongdoing--interests amounting to more than the loss of mere money--some courts have applied a higher standard of proof to "reduce the risk to the defendant of having his reputation tarnished erroneously." *Addington,* 441 U.S. at 424, 99 S.Ct. 1804. There is no facile calculus for determining in every case what the standard of proof should be.[7]

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[7] A careful review of Washington law suggests the Dr. Nguyen's simplistic formula is simply wrong. For instance, it is wellsettled that "a society that values the good name and freedom of every individual should

not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship,* 397 U.S. 358, 363-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *accord State v. Crediford,* 130 Wash.2d 747, 759, 927 P.2d 1129 (1996). But even in the area of criminal law, there are numerous occasions when preponderance of the evidence is sufficient to carry a burden of proof. For example, the State bears the burden of proving by only a preponderance of the evidence the voluntariness of a defendant's confession. *State v. Braun,* 82 Wash.2d 157, 162, 509 P.2d 742 (1973) (citing *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)). When the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the standard of proof is only preponderance of the evidence. *Colorado v. Connelly,* 479 U.S. 157, 168, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *accord State v. Robtoy,* 98 Wash.2d 30, 35-36, 653 P.2d 284 (1982). If the prosecution can establish by a mere preponderance that evidence it seeks to introduce ultimately or inevitably would have been discovered by lawful means, the evidence may be admitted. *State v.. Warner,* 125 Wash.2d 876, 889, 889 P.2d 479 (1995) (citing *Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), *cert. denied,* 471 U.S. 1138, 105 S.Ct. 2681, 86 L.Ed.2d 699 (1985)). To admit evidence of prior crimes under ER 404(b), the trial court must find only by a preponderance of the evidence the claimed misconduct occurred. *State v. Brown,* 132 Wash.2d 529, 571, 940 P.2d 546 (1997).

In Washington's statutory law, the Legislature has adopted the clear and convincing standard of proof in many instances where only money is involved. For instance, according to RCW 11.12.095(3), dealing with "omitted spouses," as the statute defines that term, "[t]he omitted spouse must receive an amount equal in value to that which the spouse would have received under RCW 11.04.015 if the decedent had died intestate, unless the court determines on the basis of clear and convincing evidence that a smaller share, including no share at all, is more in keeping with the decedent's intent." RCW 4.24.460(2) creates a presumption of liability on the part of the operators of nuclear waste repositories that is rebuttable by clear and convincing evidence "that the nuclear incident was not the result of the operator's negligence and that the operator's negligence was not an actual cause of the nuclear incident." RCW 19.118.095(2), dealing with motor vehicle warranties, permits the State to charge a fine for noncompliance with an agency decision, "unless the manufacturer can provide clear and convincing evidence that any delay or failure was beyond its control or was acceptable to the consumer as evidenced by a written statement signed by the consumer."

In sum, upon review of the foregoing authorities, there is no question Dr. Nguyen's private interest is significantly affected. The revocation of Dr. Nguyen's license exposed him to loss of livelihood, diminished reputation, and professional dishonor, particularly where sexual misconduct is alleged. The private interest affected here is important, and Dr. Nguyen has a significant right in his medical license. But Dr. Nguyen's interest in his license does not necessarily require a heightened standard of proof. We must consider the other *Mathews* factors.

**2. The Risk of Erroneous Deprivation**

Under the second prong of the *Mathews* test, the procedure Dr. Nguyen received did not create an unacceptable risk of

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Washington's common law also shows the presence of varying standards of proof that do not fit neatly into categories. Fraud must be proved by clear and convincing evidence. *Smith v. Doty*, 91 Wash. 315, 323, 157 P. 881 (1916). A person who asserts the creation of a trust by operation of law must produce evidence that is clear, cogent, and convincing to carry the burden of proving the trust exists. *Rodgers v. Simmons*, 43 Wash.2d 557, 561, 262 P.2d 204 (1953). Wills are presumed to be valid, and the burden is upon will contestants to prove the contrary by clear, cogent, and convincing evidence. *In re Estate of Riley*, 78 Wash.2d 623, 656, 479 P.2d 1 (1970). "The burden of showing excessive valuation made by the assessor was upon the appellant, and to overthrow the correctness of his determination of values requires evidence of the most clear and convincing character before the court can say that there has been worked any constructive fraud upon appellant's rights as a taxpayer." *Heuston v. King County*, 90 Wash. 200, 202, 155 P. 773 (1916). Clear, cogent, and convincing is the standard of proof for those attempting to prove a resulting trust. *In re Estate of Spadoni*, 71 Wash.2d 820, 822-23, 430 P.2d 965 (1967). Here again, the clear and convincing standard applies in situations that involve money only.

These cases demonstrate the appropriate standard of proof depends on many more considerations than whether "mere money" is involved in the outcome of the dispute.

erroneous deprivation of, or restriction on, his license to practice medicine. The Supreme Court said in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980):

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.

Judge Friendly listed what he called the "elements of a fair hearing": (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against one; (6) the right to have the decision based only on the evidence presented; (7) counsel; (8) the making of a record; (9) a statement of the reasons; (10) public attendance; (11) judicial review. Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L.REV. 1267, 1279-95 (1975). Evaluating the Commission process objectively, using the factors Judge Friendly enumerated regarding due process, demonstrates the statutory scheme affords ample protection to a professional's interests.

**a. Unbiased Tribunal**

The Commission, in accordance with the existing statutes, consisted of one licensed physician from each of Washington's congressional districts, two physician's assistants, and four members of the public, all appointed by

the Governor. RCW 18.71.015. The public members are limited to people who are not members of other health profession boards and do not "have a fiduciary obligation to a facility rendering health services regulated by the Commission, or have a material or financial interest in the rendering of health services regulated by the commission." RCW 18.71.015. Thus, professionals like Dr. Nguyen are judged by panels consisting largely of professional peers, rather than solely by administrative law judges or other judicial officers.[8] We held in *Haley* and *Heinmiller* the special expertise of professional peers sitting on a professional disciplinary body can give sufficient content to general terms like "moral turpitude" to withstand vagueness challenges. *Haley,* 117 Wash.2d at 733, 818 P.2d 1062; *Heinmiller,* 127 Wash.2d at 605, 903 P.2d 433. This special expertise also serves to protect the professional from uninformed disciplinary decisions. There is nothing to suggest from the statutory makeup of the Commission that Dr. Nguyen did not receive the benefit of an unbiased tribunal.

**b. Notice of the Proposed Action and the Grounds Asserted For It**

RCW 18.130.090 requires the disciplinary authority to serve the license holder with a statement of charges detailing the alleged violations. Dr. Nguyen was served with the statement of charges and an amended statement of charges. As shown by Dr. Nguyen's reaction to this notice, this document provided him with adequate notice of the grounds for imposition of discipline.

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[8] By contrast, the Commission on Judicial Conduct must have a majority of lay members. Wash. Const. art. iv, § 31(1).

**c. An Opportunity to Present Reasons Why the Proposed Action Should Not Be Taken**

Pursuant to RCW 18.130.100, Dr. Nguyen received a hearing under the auspices of the APA lasting over six days.[9] A review of the record of the hearing reveals a vigorously contested trial in which both sides were zealously represented by counsel. At the hearing, Dr. Nguyen presented witnesses on his own behalf. After the hearing, he appealed to the superior court where he received appropriate judicial review.

Dr. Nguyen vigorously pursued his appeal. In the trial court and in the Court of Appeals, Dr. Nguyen assigned error to the Commission's findings of fact, which the trial court and the Court of Appeals affirmed. Indeed, Dr. Nguyen has not attempted to demonstrate which particular Commission findings of fact would not be sustained if a clear, cogent, and convincing standard were employed.

**d. The Right to Call Witnesses**

RCW 34.05.446 gives both the presiding officer and counsel for parties the right to issue subpoenas to compel witnesses to attend the hearing. At the hearing, Dr. Nguyen called numerous witnesses to testify for him.

**e. The Right to Know the Evidence Against One**

RCW 34.05.446(3) permits employment of all the civil discovery rules contained in CR 26 through 36, at the discretion of the presiding officer. Dr. Nguyen's counsel had

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[9] RCW 34.05.449(2) provides, in part: "To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence...." Dr. Bang availed himself of these rights.

the opportunity to review the investigative file, and conduct appropriate discovery. Dr. Nguyen has not alleged that his ability to present a defense was limited by inadequate discovery procedures.

**f. The Right to Have the Decision Based Only on the Evidence Presented**

There is no provision or authority in the APA or the Act for the Commission to make its decision on anything other than information presented at the hearing. The APA requires any findings of fact to be "based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4).

**g. Right to Counsel**

RCW 34.05.428(2) permits representation by counsel. Dr. Nguyen was represented throughout the hearing by very competent counsel.

**h. The Making of a Record**

RCW 34.05.449(4) requires the recording of hearings. The recording of the hearing in this case was transcribed, and appears in the appellate record.

**i. A Statement of the Reasons**

The Commission's findings of fact and conclusions of law were set forth in a 74-page opinion and were supported by the evidence.

**j. Public Attendance**

RCW 34.05.449(5) provides hearings are open to public observation. The record is silent as to whether members of the public attended Dr. Nguyen's hearing.

**k. Judicial Review**

RCW 34.05.510 through .598 provides for judicial review of the Commission's decision. Pursuant to those provisions, Dr. Nguyen sought review in the superior court, the Court of Appeals, and now this Court.

In sum, the statute and regulations for medical discipline afforded Dr. Nguyen as much procedural due process as the law allows in any context, and certainly no less than the constitution requires. Moreover, the unequivocal impression the record conveys is of a case exhaustively litigated with appropriate skill and fervor by both parties. The conduct of the hearing, before a panel the majority of whom were medical practitioners, does not support Dr. Nguyen's claim regarding an unacceptable risk of inadvertent or erroneous deprivation of Dr. Nguyen's professional license. This risk was certainly minimal given the numerous procedural protections afforded Dr. Nguyen.

**3. The Strength of the Public Interest in Professional Discipline**

The third prong of *Mathews,* the public interest in professional discipline, including the government's added fiscal and administrative burdens in having a heightened standard of proof in professional disciplinary hearings, is critical here.

Under the plain reading of *Mathews,* the cost to the government is only one component of the government's interest. *See, e.g., Morris v. Blaker,* 118 Wash.2d 133, 145, 821 P.2d 482 (1992) (noting "the government's interest in being able to quickly remove dangerous weapons from those who present a danger to the public weighs against a prerevocation notice and hearing procedure"); *In re Harris,* 98 Wash.2d 276, 286, 654 P.2d 109 (1982) (under *Mathews* balancing test, because State's interest in statutory summons procedure was not "emergent," due process requires a finding of probable dangerousness before a summons may issue). The *Mathews* Court itself said, "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews,* 424 U.S. at 348, 96 S.Ct. 893.

The United States Supreme Court demonstrated how the balance is to be drawn: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington,* 441 U.S. at 427, 99 S.Ct. 1804. *Santosky,* in evaluating the third prong of the *Mathews* test, is particularly illustrative of the use of factors other than just fiscal and administrative costs: "Two state interests are at stake in parental rights termination proceedings--a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky,* 455 U.S. at 766, 102 S.Ct. 1388.

The public interest in professional discipline encompasses both the government's interest in efficiently processing professional disciplinary complaints and the public's interest in competent, honest health care practitioners. In

Washington, the latter interest weighs heavily against a heightened standard of proof in medical discipline cases. Washington law on health care professional discipline indicates a strong remedial policy to protect the public from incompetent or unscrupulous practitioners.

This remedial policy emanates from the constitutional authority of the Legislature over the practice of medicine. Article XX, section 2 of our state constitution provides:

> The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

*See also Seeley v. State,* 132 Wash.2d 776, 789, 940 P.2d 604 (1997).

We have held the legislative power over the practice of the healing arts is virtually plenary. In *Ellestad v. Swayze,* 15 Wash.2d 281, 291, 130 P.2d 349 (1942), we stated:

> The authorities are uniform to the effect that the legislature may adopt such regulations and restrictions of the healing arts as it may consider necessary for the public good, and the courts will not question the wisdom or desirability of such legislative requirements, so long as there is any reasonable basis upon which the legislative determination can rest.

*See also State v. Wilson,* 11 Wash.App. 916, 528 P.2d 279 (1974). The use of the phrase "any reasonable basis" is indicative of our early determination to apply only the most relaxed standard of review to legislative enactments with respect to the practice of medicine. We have also noted the significance of the public's interest in the regulation of the medical profession:

> The daily practice of medicine concerns life and death consequences to members of the public. They have an understandable interest in the maintenance of sound standards of conduct by medical practitioners. The public has a right to expect the highest degree of trustworthiness of the members of the medical profession.

*Kindschi,* 52 Wash.2d at 12, 319 P.2d 824.

To carry out the constitutional mandate to regulate the practice of medicine and surgery, the Legislature created the Commission, the purpose of which is set forth in detail in RCW 18.71.003:

> (1) In the exercise of the police power of the state to protect public health, to promote the welfare of the state, and to provide an adequate public agency to act as a disciplinary body for the members of the medical profession licensed to practice medicine and surgery in this state;
>
> (2) Because the health and well-being of the people of this state are of paramount importance;
>
> (3) Because the conduct of the members of the medical profession licensed to practice medicine and surgery in this state plays a vital role in preserving the health and well-being of the people of the state; and
>
> (4) Because the agency which now exists to handle disciplinary proceedings for members of the medical profession licensed to practice medicine and surgery in this state is ineffective and very infrequently employed, and consequently there is no effective means of handling such disciplinary proceedings when they are necessary for the protection of the public health.

The Legislature articulated a similar concern about protection of the public when it enacted the Act. RCW 18.130.010 indicates the purpose of the Act "is to assure the public of the adequacy of professional competence and conduct in the healing arts."

We have also expressed similar purposes for professional discipline. In *Haley,* 117 Wash.2d at 727, 818 P.2d 1062, we stated:

> The Legislature enacted the Medical Disciplinary Board Act (Act), the statute creating the Board, in 1955. RCW 18.72. The Act was passed in the exercise of the State's police power to promote the public welfare and to create an administrative agency mandated to act as a disciplinary body for medical professionals. RCW 18.72.010(1). The Act also provides that it was passed because of the paramount importance of the health and well-being of Washington citizens, the role of medical professionals in preserving this health and well- being, and the ineffectiveness of the disciplinary agency that had existed previously. RCW 18.72.010(2)-(4). *We interpret the stated purposes of the Act as giving the Board a legislative mandate to pursue vigorously its disciplinary task.*

(Emphasis added.) *See also Heinmiller,* 127 Wash.2d at 602-03, 903 P.2d 433 ("The goal of the Uniform Disciplinary Act, of which RCW 18.130.180 is a part, is to protect the public from the hazards of health care professional incompetence and misconduct.").

Plainly, the central focus of professional discipline in health care is to protect the public and ensure that only competent practitioners provide health care:

> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely....

*Dent,* 129 U.S. at 122, 9 S.Ct. 231. The sine qua non of professional licensure and discipline is *protection of the public* employing professional services. *Gandhi v. State Med. Examining Bd.,* 168 Wis.2d 299, 483 N.W.2d 295, 305 (1992).

The wrongdoing of a physician can be threatening to life and limb. As the United States Supreme Court noted: "We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (emphasis added).

The people of Washington certainly have a "compelling interest" in disciplining doctors who fail to meet standards of professional competence, who misprescribe medications, and who sexually abuse their patients. The State's interest in regulating the practice of medicine and protecting the public from incompetent or unscrupulous practitioners is of vital significance to the State and its citizens.

In conclusion, examining and balancing the three *Mathews* factors for due process, we cannot say the Legislature in its

plenary authority over medical discipline violated Dr. Nguyen's right to due process by authorizing the Commission to utilize a preponderance of the evidence burden of proof. Under *Mathews,* a professional license is a significant property interest with overtones of a liberty interest where the professional's reputation is at stake, but the risk of an erroneous deprivation of such an interest in the Commission context is limited given the procedures afforded a physician before discipline may occur. The paramount interest in professional discipline, however, is the public interest in competent health care practitioners. Due process principles do not compel the clear, cogent, and convincing standard of proof in health care professional discipline cases under the APA.[10]

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[10] Although we have considered the issue independently and in light of factors particular to Washington, we note that our holding represents the majority rule. Courts in numerous jurisdictions including Alabama, Arkansas, Connecticut, District of Columbia, Iowa, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Utah, South Carolina, Texas, and Wisconsin, have upheld the preponderance of the evidence standard in professional discipline cases against constitutional challenges. See listing of cases at *Johnson v. Bd. of Governors,* 913 P.2d 1339, 1353 (Okla.1996) (Summers, J., dissenting in part). Recently, in *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs,* 329 S.C. 371, 496 S.E.2d 17 (1998), the South Carolina Supreme Court reversed a contrary intermediate appellate court decision and held the preponderance standard was constitutional.

A minority of jurisdictions has determined the clear, cogent, and convincing standard of proof is necessary for medical disciplinary proceedings. *See, e.g., Johnson,* 913 P.2d 1339 (because of penal nature of disciplinary proceedings against dentist, Oklahoma constitution requires clear and convincing standard of proof). None of the states requiring clear and convincing evidence, like Oklahoma, bases its determination on constitutional grounds, however. In Mississippi, the determination to use the clear and convincing standard stems not from constitutional concerns, but from the egregious conduct of the individuals subject to discipline. *See Miss. State Bd. of Nursing v. Wilson,* 624 So.2d 485 (Miss.1993) (crime of false pretenses); *Hogan v. Miss. Bd. of Nursing,* 457 So.2d 931, 934 (Miss.1984) (misappropriation of narcotics); *Levi v. Miss. State Bar,* 436 So.2d 781, 783 (Miss.1983) (fraud and

## B. EQUAL PROTECTION

Dr. Nguyen contends the employment of a higher standard of proof in attorney discipline cases commands the use of the higher standard of proof in medical discipline cases on equal protection grounds. The Department here adopted the preponderance standard by rule pursuant to a broad grant of procedural authority by the Legislature. As we noted in *Haddenham v. State,* 87 Wash.2d 145, 150, 550 P.2d 9 (1976), however, the Legislature is afforded wide discretion in making classifications in legislation:

> The legislature is given a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. The guaranty is not of absolute equality, requiring the law to treat all persons exactly alike. *Tigner v. Texas,* 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124, 130 A.L.R. 1321 (1940). The constitutional safeguard is offended only if the classification rests on grounds wholly

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equivalent forms of misconduct). The Mississippi Supreme Court simply held in these cases, copying the model of civil cases, that clear and convincing is the appropriate standard of proof for such offenses. The Nebraska Supreme Court did not consider due process in adopting the clear and convincing standard for discipline of a psychiatrist. Rather, for the "sake of uniformity and clarity," the court adopted the same standard for physicians as was already in place for lawyers. *Davis v. Wright,* 243 Neb. 931, 936, 503 N.W.2d 814 (1993). Two cases are of importance in California. In *Silva v. Superior Court,* 14 Cal.App.4th 562, 571, 17 Cal.Rptr.2d 577 (1993), the court interpreted the applicable statute to require clear and convincing evidence, and made no constitutional determination. In *Ettinger v. Bd. of Med. Quality Assurance,* 135 Cal.App.3d 853, 856, 185 Cal.Rptr. 601 (1982), the court also presented no constitutional analysis in adopting the clear and convincing standard, holding only it would be "anomalous" for disciplinary proceedings involving physicians to have a lower standard of proof than disciplinary proceedings involving lawyers. *See also Painter v. Abels,* 998 P.2d 931 (Wyo.2000).

irrelevant to the achievement of the State's objective. *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

It is an established rule of law in this state that an enactment is presumptively valid, and the burden is upon the challenger to prove that the questioned classification does not rest upon a reasonable basis. *State v. Perrigoue,* 81 Wash.2d 640, 503 P.2d 1063 (1972). Merely challenging the wisdom or expediency of the statute is insufficient. *Brewer v. Copeland,* 86 Wash.2d 58, 542 P.2d 445 (1975).

Dr. Nguyen's reliance on cases of attorney and judicial discipline is misplaced. He neglects to note that the Washington Constitution consigns regulation of health care professionals to the Legislature, while regulation of the legal profession has always been an inherent power of this Court under separation of powers principles. *Graham v. State Bar Ass'n,* 86 Wash.2d 624, 628, 548 P.2d 310 (1976).

The requirement of a clear, cogent, and convincing standard of proof in *In re Disciplinary Proceeding Against Allotta,* 109 Wash.2d 787, 748 P.2d 628 (1988) (attorney discipline), was adopted by rule pursuant to our plenary authority to establish regulations for the practice of law. RLD 4.11(b); arguably, it is within our power to adopt a lower standard of proof should we wish to do so.

Under a separation of powers analysis, just as we have plenary power over the qualifications of attorneys, the Legislature enjoys considerable authority over licensure of the health care professions. Wash. Const. art. XX, § 2. This asymmetry of different standards of proof for discipline of lawyers and judges, as compared to discipline of doctors in Washington, is possible under the constitutional design the

people of Washington have chosen for regulation of physicians,[11] and cannot be said to be irrational where the Legislature did not make the classification. The Legislature's grant of authority to the Department and the Department's choice of the burden of proof is rooted in a strong desire to protect the public from incompetent practitioners who can place their life and limb at risk. No constitutional violation is present.

## CONCLUSION

Under the Act and Washington's APA, in light of the plenary authority of the Legislature over medical practice, a preponderance of the evidence standard, adopted by agency rule making, applies to the Commission's proceedings, in the absence of a legislative determination to the contrary. Under the Washington Constitution, the legislative branch of government has the right to set policy for the disciplining of health care practitioners.

In carefully balancing the interests of all concerned, as *Mathews* requires, we conclude the preponderance of the evidence standard of proof better calibrates the balance of

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[11] Courts in several states have actually found differing standards of proof for discipline of attorneys and physicians *not* to violate equal protection. *See, e.g., In re Polk*, 90 N.J. 550, 449 A.2d 7 (1982); *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234 (Iowa 1991); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456 (1993); *Anonymous (M- 156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998). As the Iowa Court cogently observed:

> The state is free to deal with different professions differently without violating the equal protection guarantees established under the federal and state constitutions. This is particularly true where the regulations being compared have been established by different branches of government.

*Eaves*, 467 N.W.2d at 237 (citation omitted).

interests between the practitioner and the public, given the vital concern of the people for protection from negligent or dishonest practitioners, a concern stated in the Washington Constitution: medical professionals have a right to due process before their professional license may be taken away, but the people also have an equally significant need to protect themselves against incompetent and dishonest professionals.

The preponderance of the evidence standard does not violate Dr. Nguyen's right to due process or equal protection. Dr. Nguyen received fundamental fairness in the adjudication of the charges against him under the statutory and regulatory procedures afforded him. The decision of the Commission should be affirmed.

GUY, J.P.T., and BRIDGE, J., dissent.

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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

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| BANG D. NGUYEN,<br><br>Petitioner,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF HEALTH, MEDICAL QUALITY ASSURANCE COMMISSION,<br><br>Respondent. | No. 43005-0-I<br><br>Division I<br><br>Filed Nov. 29, 1999 |

WEBSTER, J.

Appellant Bang D. Nguyen appeals the superior court's affirmance of findings of fact, conclusions of law, and final order issued by the Department of Health, Medical Quality Assurance Commission. The Commission found that Nguyen had committed unprofessional conduct and revoked his license to practice medicine with no right to reapply for a minimum of five years. The three primary issues presented

by Nguyen's appeal are: (1) did the Commission apply the correct burden of proof to this medical disciplinary proceeding; (2) are the Commission's findings of fact supported by substantial evidence in the record; and (3) is the Commission's disciplinary action arbitrary and capricious? We find that: (1) application by the Commission of the preponderance of the evidence burden of proof did not violate due process or equal protection; (2) the Commission's findings are supported by substantial evidence in the record; and (3) the Commission's discipline is not arbitrary and capricious where its primary charge is to protect the health of the public. We decline to address Nguyen's remaining contentions. Thus, we affirm.

## *BACKGROUND*

On April 22, 1989, Nguyen and the Medical Disciplinary Board, predecessor to the Commission, entered a stipulation and agreed final order, which found that Nguyen had provided medical care that fell below acceptable standards and created an unreasonable risk of harm to a patient. Nguyen's license was suspended, but the suspension was stayed provided that Nguyen comply with stated terms and conditions. Nguyen's practice was subsequently monitored.

On November 17, 1994, charges were issued against Nguyen alleging unprofessional conduct toward 20 patients, confidentially identified. The Commission issued an agreed order for assessment and evaluation of Nguyen's medical skills.

On October 11, 1996, the Commission issued an amended statement of charges that added the allegation that the ordered assessment demonstrated that Nguyen's practice of medicine created an unreasonable risk of harm to patients and added two more patients to the prior list.

On December 16, 1996, the Commission issued an ex parte Notice and Order of Summary Suspension based on new allegations that Nguyen engaged in sexual misconduct toward three female patients. A prompt hearing was held on February 13, 1997, to consider the limitations of the summary suspension. Robert Miller, M.D., testified in rebuttal for the Department. The Commission stayed the suspension pending a hearing on the merits provided that Nguyen complied with stated conditions, including a requirement that a chaperone be present during the entire physical examination of all female patients.

A six-day hearing was held on the merits. Health Law Judge Arthur E. DeBusschere presided and the Commission panel members in attendance included four medical doctors and one public member. Nguyen was represented by counsel. Numerous witnesses for both sides testified and voluminous exhibits were introduced. Witnesses included, among others, the doctors who had been enlisted to monitor Nguen's practice and the three female patients toward whom Nguyen was accused of committing sexual misconduct. Among the exhibits included were the medical records for over 20 patients, the report of the ordered assessment of Nguyen's skills, and a videotape of Nguyen's performance at the assessment.

The Commission issued Findings of Fact, Conclusions of Law, and Final Order on September 9, 1997. The Commission found that Nguyen did not have the skills necessary to safely practice medicine, failed to comply with conditions of the 1989 Agreed Order, and committed sexual misconduct toward three female patients. The Commission concluded that Nguyen's conduct constituted unprofessional

conduct and revoked Nguyen's license to practice medicine with no right to reapply for a minimum of five years.

The superior court affirmed the Commission.

## *STANDARD OF REVIEW*

Licensing and disciplinary procedures for the health professions are established by the Uniform Disciplinary Act (UDA). See RCW 18.130.010. The UDA specifies that all adjudicative proceedings are governed by the Administrative Procedure Act (APA). See RCW 18.130.100. The APA delineates judicial review of administrative agency actions. See RCW 34.05.570(3)(a)-(i). For purposes of the issues presented in this case, we may grant relief from the Commission's order only if we determine that:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
> ...
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
> ...
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3). Our review is based on the administrative record before the Commission, not on the superior court record. See *City of Redmond v. Cent. Puget Sound Growth Management Hearings Bd.*, 136 Wash.2d 38, 45, 959 P.2d 1091 (1998). Nguyen bears the burden of showing that the Commission's action was not valid. See

RCW 34.05.570(1)(a). Relief under RCW 34.05.570(3)(d) for erroneous interpretation and application of the law is reviewed de novo. See *Cent. Puget Sound,* 136 Wash.2d at 46, 959 P.2d 1091. "We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute." *Id.* Substantial evidence under RCW 34.05.570(3)(e) is that which is sufficient to persuade a fair- minded person of the truth of the factual finding. See *id.* We do not weigh credibility or substitute our judgment for that of the agency. See *U.S. West Communications, Inc. v. State Utils. and Transp. Comm'n,* 134 Wash.2d 48, 62, 949 P.2d 1321 (1997). For purposes of subsection (3)(i), arbitrary and capricious agency action is "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Cent. Puget Sound,* 136 Wash.2d at 46-47, 959 P.2d 1091 (internal quotation omitted). If there are two plausible opinions, agency action is not arbitrary and capricious. See *id.* at 47, 959 P.2d 1091.

## *ANALYSIS*

### A. *A Preponderance of the Evidence Burden of Proof in Medical Disciplinary Proceedings Is Appropriate*

The legislature has determined that medical disciplinary proceedings are governed by the ABA. See RCW 18.130.100. Both the DA and the ABA are civil statutes. Disciplinary action by the Commission is clearly civil in nature. The ordinary burden of proof to resolve a dispute in a civil administrative proceeding is by a preponderance of the evidence unless otherwise mandated by statute or due process. See *Thompson v. State Dep't of Licensing,* 138 Wash.2d 783, 797, 982 P.2d 601 (1999).

Under the UDA, the legislature has delegated to the Department of Health the power to adopt rules necessary to carry out its disciplinary functions. See RCW 18.130.050(1); RCW 18.71.010. The Department of Health established the preponderance of the evidence burden for all cases. See WAC 246-10- 606. The legislature has not acted to change this rule since it became effective in 1993. We therefore presume that the legislature intends the preponderance of the evidence burden to apply to medical disciplinary proceedings.

Nguyen argues that application of a preponderance of the evidence burden of proof to medical disciplinary proceedings violates the equal protection and due process guarantees of the United States and Washington constitutions. He asserts that these constitutional principles require application of a clear and convincing burden of proof. The states that have addressed this issue are split. Compare, e.g., *In re Polk*, 90 N.J. 550, 449 A.2d 7, 16-17, 19 (1982) (finding that application of the preponderance of the evidence burden of proof to medical disciplinary proceedings does not violate due process or equal protection), with *Johnson v. Bd. of Governors of Registered Dentists of Oklahoma*, 913 P.2d 1339, 1347 (Okla.1996) (due process requires application of a clear and convincing burden); see also *Anonymous v. State Bd. of Medical Examiners*, 329 S.C. 371, 496 S.E.2d 17, 20 n. 4 (1998) (collecting cases).

The clear and convincing standard is applied where the threatened loss due to a civil proceeding is comparable to the loss of liberty in a criminal proceeding. See *Addington v. Texas*, 441 U.S. 418, 432-33, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (holding that due process requires application of a clear and convincing standard to civil commitment proceedings). Furthermore, a clear and convincing standard applies where "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *Santosky v. Kramer*,

455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (holding that the clear and convincing standard is required in proceedings to terminate parental rights). A clear and convincing standard has also been held necessary where a government-initiated proceeding threatens an individual with stigma. See *id.*

*1. Due Process*

A due process analysis requires us to balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Looking first to the private interest involved here, we recognize that it is substantial. The revocation of a medical license is not only an economic loss but also damaging to professional and personal reputation. It is not extreme to say that the revocation of a medical license carries a stigma.

We turn next to the government's interest. The legislature established the Commission to "regulate the competency and quality of professional health care providers." RCW 18.71.002. "Rules, policies, and procedures developed by the commission must promote the delivery of quality health care to the residents of the state of Washington." RCW 18.71.002. The legislature's declared

purpose in disciplining licensed physicians is to protect the public:

This chapter is passed:

(1) In the exercise of the police power of the state to protect public health, to promote the welfare of the state, and to provide an adequate public agency to act as a disciplinary body for the members of the medical profession licensed to practice medicine and surgery in this state;
(2) Because the health and well-being of the people of this state are of paramount importance;
(3) Because the conduct of members of the medical profession licensed to practice medicine and surgery in this state plays a vital role in preserving the health and well-being of the people of the state;....

RCW 18.71.003. This stated purpose gives the Commission a "legislative mandate to pursue vigorously its disciplinary task." *Haley v. Medical Disciplinary Bd.*,[1] 117 Wash.2d 720, 727, 818 P.2d 1062 (1991). Thus, we find that the government's interest in protecting the public is weighty.

Finally, we examine the risk of erroneous deprivation. Judging from the record before us, the procedures established for review of alleged physician misconduct appear to provide for a careful and deliberate determination. Nguyen had an ample and fair opportunity to be heard at a six-day hearing. The adversarial hearing was conducted by a health law judge. Nguyen was represented by counsel. The fact-finding and decisionmaking panel included four physicians, who had special expertise to understand the nature of the subject matter. The hearing was recorded. The Commission issued

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[1] The Medical Disciplinary Board was predecessor to the Commission.

extensive findings of fact and conclusions indicative of a deliberate decision- making process. We find that there is not a substantial risk of inaccurate findings or erroneous conclusions and that increasing the burden to clear and convincing would decrease the risk minimally.

In conclusion, we find that the declared governmental interest in protecting the public and the comparatively low risk of erroneous deprivation outweigh the private interest. That is, we find that application of the preponderance of the evidence burden does not violate due process.

*2. Equal Protection*

Nguyen's equal protection argument is based upon the application of a clear and convincing burden of proof to attorney disciplinary proceedings. He asserts that application of a less stringent burden to medical disciplinary proceedings is a classification that violates equal protection. No suspect class or fundamental right is involved here. Thus, the legislature's classification in this case does not violate equal protection if it is reasonable and rationally related to a legitimate governmental interest. See *Griffin v. Eller,* 130 Wash.2d 58, 65, 922 P.2d 788 (1996).

"The legislature has wide discretion in designating classifications." See *Johnson v. Tradewell Stores, Inc.,* 95 Wash.2d 739, 744, 630 P.2d 441 (1981). A state is free to "deal with the different professions according to the needs of the public in relation to each." *Semler v. Oregon Bd. of Dental Examiners,* 294 U.S. 608, 610, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). This is particularly true where the regulations are created by separate branches of the government. See *In re Grimm,* 138 N.H. 42, 635 A.2d 456, 462 (1993) (collecting cases). The Washington State Supreme Court has responsibility for the administration of attorney discipline,

but the legislature regulates physicians. See RLD 2.1; RCW 18.71.

The legislature's choice to allow a different burden of proof for the health profession than for the legal profession is reasonable and rationally related to the legislature's legitimate purpose of protecting the public health. The legislature is justified in providing a less stringent burden of proof in proceedings involving the licenses of those who daily engage in life and death concerns. See *Polk*, 449 A.2d at 18. The New Hampshire Supreme Court provided two other justifications for differing standards for attorneys and physicians. See *Grimm*, 138 N.H. at 51, 635 A.2d 456. First, the difficulty of proof in allegations of physician misconduct is likely greater where often the only parties present to witness misconduct are the physician and the patient, and records are made primarily by the physician; in contrast, much of the attorney's work is carried out in the courtroom or in the presence of opposing counsel, and typically an extensive paper trail is created. See *id.* Second, attorneys are involved in a process where there is often a losing party; thus, the higher burden of proof serves to weed out frivolous claims. See *id.*

Thus, we conclude that application of the preponderance of the evidence burden of proof to medical disciplinary proceedings does not violate due process or equal protection and is an appropriate standard.

The panel having determined that the remainder of this opinion lacks precedential value and will not be printed in the Washington Appellate Reports but will be filed for public record in accord with RCW 2.06.040, it is so ordered.

AGID, A.C.J., and GROSSE, J., concur.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

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| BANG D. NGUYEN, M.D.,<br><br>Petitioner,<br><br>v.<br><br>STATE OF WASHINGTON DEPARTMENT OF HEALTH, MEDICAL QUALITY ASSURANCE COMMISSION,<br><br>Respondent. | No.<br>97-2-23112-4-SEA<br><br>MEMORANDUM ORDER AFFIRMING COMMISSION |

The court's review of the agency action below is circumscribed by the state Administrative Procedure Act (APA). For findings of fact made by administrative bodies, the Superior Court must apply the "substantial evidence" test in RCW 34.05.570(3)(e). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Valentine v. Dept of Licensing*, 77 Wn.App. 838, 844 (1995). This is a "deferential" review standard where the court is prohibited from substituting its judgment for that agency.

The court does not enter detailed findings of facts and conclusions of law. It is operating more in the nature of an appellate court determining whether error occurred at the administrative level either as to findings of fact or interpretations of law. If this matter is appealed to the Court of Appeals or Supreme Court, that appellate court will conduct a *de novo* review of the final decision by the Commission "on the administrative record, and not the

Superior Court findings and conclusions." *Valentine*, 77 Wn.App.at 844,n.2.

This court has reviewed the pertinent findings of fact relating to the Commission's conclusions that Dr. Nguyen's deficient care and treatment of several patients and his unwanted sexual contact with three other patients constituted unprofessional conduct. The court is satisfied that these challenged factual findings are amply supported by the record and must be upheld under the deferential substantial evidence review standard. While Dr. Nguyen has presented another perspective on the facts of these cases, the Commission was entitled to exercise its prerogative as fact finder not to afford credence to the opinions of Dr. Nguyen or his witnesses. *Heinmiller v. Dept. of Health*, 127 Wn.2d 595 (1995). This deference is especially appropriate where the Commission's experience, technical competency, and specialized knowledge" obviously was used to evaluate the evidence. RCW 34.05.461(5). There is no evidence the Commission members were biased in their conduct of the hearing or in how the Commission functioned. In addition, the record does not support the allegation that petitioner was denied the ability to present evidence of bias against Dr. Nguyen. The hearsay objection to Mr. Loc's testimony was property sustained. RP 3485-3500.

The court also is satisfied that there was no violation of constitutional due process in regard to the burden of proof applied by the Commission at its six-day hearing.

This court recognizes there is a split throughout the country on whether or not a preponderance of the evidence standard is sufficient to revoke a doctor's license to practice medicine. Compare *Johnson v. Board of Governors*, 913 P.2d 1339, 1347 (OK1.1996) ("The Board rule does not comply with federal or state minimum constitutional due

process requirements."), with *In re Polk*, 449 A.2d 7, 16 (N.J. 1982) ("We are satisfied that the preponderance of the evidence burden of proof is sufficient for purposes of an administrative adjudication concerning professional guilt and discipline against a licensed medical doctor.")

Both due process and equal protection arguments are presented in favor of a higher burden of proof for medical disciplinary action. The due process analysis addresses balancing the following three factors; (1) the nature of the private interest affected by the proceeding; (2) the countervailing governmental interest to be furthered by the proceeding; and (3) the risk of error in the ultimate determination created by the use of the particular burden of proof. *Mathews v. Eldridge*, 424 U.S. 319,335 (1976). The equal protection analysis focuses on the fact that attorney disciplinary proceedings are governed by the clear and convincing standard. Therefore, if there are no meaningful differences between disciplining attorneys and doctors, the disparate burdens of proof violate equal protection.

Washington appellate courts have not yet ruled on these constitutional challenges.[1] Petitioner raised the issue in his Brief in Support of Petition and Appeal for Judicial Review on both state and federal constitutional grounds. The discipline of doctors in Washington is covered by the Uniform Disciplinary Act (RCW 18.130.010 et seq.) And the Medical Quality Assurance Commission, both of which are products of legislative acts. The legislature has established a preponderance of the evidence standard for all matters under the Administrative Procedures Act. The

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1 The issue was briefed in a petition for review granted in *McIntyre v. State*, 133 Wn.2d 859 (1997) but a divided 4-4 vote left intact an unpublished opinion by the Court of Appeals that did not decide the burden of proof issue. *McIntyre v. State*, 79 Wn. App. 1066 (1995).

Department of Health has passed a rule further clarifying that the preponderance of evidence is the burden of proof for all its disciplinary proceedings. WAC 246-10-606. The legislature has not acted since then to change that rule by statute.

This court has reviewed the other state opinions and those Washington cases which address the legislative intent and purpose behind the laws relating to medical discipline. See, e.g. *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720,731 (1991); *In re Kindschi*, 52 Wn2d 8, 10-11 (1958); *Medical Disciplinary Board v. Johnston*, 99 Wn2d 467 (1983); RCW 18.130.160.

Given the strong substantive and procedural safeguards built into this state's structure for disciplining medical doctors, both in the statutes adopted by the legislature and the rules adopted by the Department of Health, this court holds that the preponderance of the evidence standard is consistent with constitutional due process and equal protection requirements. The decisions from the New Jersey Supreme Court (*In re Polk, supra*) the New Hampshire Supreme Court (*Petition of Grimm*, 635 A.2d 456 (N.H. 1993) and the Iowa Supreme Court (*Eaves v. Board of Medical Examiners*, 467 N.W. 2d 234 (Iowa 1991) were particularly persuasive in holding that the state is free to deal with different professions differently, according to the needs of the public in relation to each one. This was found to be especially true where, as here, the regulations being compared are established by separate branches of government.

This court comes to the same conclusion as the court in *In re Polk*, 449 A.2d at 16 on the use of the preponderance of the evidence proof standard:

> We are satisfied that the preponderance of the evidence burden of proof is sufficient for purposes of an administrative adjudication concerning professional guilt and discipline against a licensed medical doctor. In view of the subject matter of such proceedings, the nature of the evidence, the qualification of the witnesses, the special expertise of the tribunal, the relative advantages and resources of the parties, and the minimal risk of inaccurate or erroneous fact finding and final decision-making, confidence in a final adjudication would not be imperiled by employing the preponderance of the evidence standard. These proceedings do not demand an enhanced burden of proof.

The final decision for this court is the determination of what sanction should Dr. Nguyen suffer for these transgressions.

Recent case law established that this court's analysis of sanctions imposed must be severely restricted to a determination of whether the order is "arbitrary and capricious" under RCW 34.04.570 (3)(I). *Heinmiller v. Dept. of Health*, 127 Wn.2d at 609-10; *Keen v. Board of Accountancy*,77Wn.App.849,860(1995). The *Heinmiller* court made it clear that "harshness...is not the test for arbitrary and capricious action." 127 Wn.2d at 609. Rather

> Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

*Pierce County Sheriff v. Civil Service Commission*, 98 Wn.2d 690 (1983). The *Heinmiller* court also cited with approval the language from *Washington Medical Disciplinary Bd. V. Johnston*, 99 Wn.2d at 483:

> Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.

Paraphrasing the final paragraph of the majority opinion in *Heinmiller* to the facts of this case would yield the following result

> The commission imposed the previously described sanction after a fair hearing at which the facts were considered and [Dr. Nguyen] had an opportunity to present his arguments. It therefore cannot be said that those sanctions resulted from willful and unreasoning action. Neither can it be said that they are not necessary to protect the public. "In determining what action is appropriate, the disciplining authority must...consider what sanctions are necessary to protect....the public." RCW 18.130.160. It is not unreasonable to prohibit a [physician who engaged in unprofessional conduct in his care and treatment of numerous patients, including sexually assaulting three patients, from practicing medicine until he has been reinstated by the Commission in the future].

Accord, *Nghiem v. State*, 73 Wn.App. 405, 413-14 (1994).

Even a court's disagreement with a sanction imposed by the Commission is not a basis to find that the punishment

is "arbitrary and capricious." As the Supreme Court observed in *Medical Disciplinary Board v. Johnston*, 99 Wn.2d at 483.

> ...the State Medical Disciplinary Board made its findings after a thorough consideration of all the evidence available to it. We cannot substitute our judgment for that of the board, even if we were to see the evidence differently than the agency. Further, we must give due deference to the knowledge and expertise of the board. Accordingly, we find the conclusions of the board fully supported by the record and not arbitrary or capricious.

The court has come to the same conclusion. Therefore, having found substantial evidence to support the findings of fact and no error of law having occurred, the Final Order of the Commission must be affirmed in all parts.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Final Order of the Medical Quality Assurance Commission dated September 9, 1997 is affirmed.

DATED this 20th day of May, 1998.

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Robert S. Lasnik, Judge

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# STATE OF WASHINGTON
# DEPARTMENT OF HEALTH
# MEDICAL QUALITY ASSURANCE COMMISSION

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| In the Matter of the License to Practice Medicine and Surgery of :<br><br>BANG D. NGUYEN, M.D.,<br><br>Respondent.<br><br>(Consolidated) | Docket Nc<br>97-06-A-1211MD<br>97-06-A-1212MD<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER |

A hearing was held before the Medical Quality Assurance Commission (Commission), and Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Commission, on May 28, 29, 30, 31, June 13 and 14, 1997 at the Sea Tac Airport Hilton, Sea Tac, Washington. Members of the Commission present and considering the matter were: Don Miller, M.D.; David Williams, M.D., panel chair; Jan Polek, Public Member; and Juanita Wagner, J.D., Ph.D. The Washington State Department of Health (the Department) was represented by Ed Newcomer, Jr., Assistant Attorney General. The Respondent, Bang Duy Nguyen, M.D., was present and represented by Ralph Alfieri, Attorney at Law. The proceedings were recorded by court reporters from Robert H. Lewis & Associates. The interpreter was Helen L. Burten, Certified Court Interpreter.

Based on consideration of the evidence presented at the hearing and the charts and records herein, the Commission hereby issues the following:

## I. PROCEDURAL HISTORY

1.1 On April 22, 1989, the Medical Disciplinary Board (the Board) (predecessor to the Commission) entered a Stipulation and Agreed Final Order (No. PM 5603) with the Respondent. The Respondent's license to practice medicine and surgery was suspended for an indefinite period, but the suspension was stayed and probation granted pending his compliance with the conditions provided therein.

1.2 On November 17, 1994, a Statement of Charges (Program No. 86-07-0016 MD) was issued alleging violations of unprofessional conduct under the Uniform Disciplinary Act, chapter 18.130 RCW (UDA). Attached was a Confidential Schedule identifying Patients 1-20 who were referenced in the charges.

1.3 The hearing on the November 17, 1994 Statement of Charges was continued when the Commission issued an Agreed Order for CPEP Assessment and Technical Assistance Visit (Program No. 86-07-0116 MD) on December 14, 1995. As part of this Agreed Order, the Respondent agreed to appear on January 11-12, 1996 for assessment and evaluation at the Colorado Personalized Education for Physicians (CPEP) program. The Respondent understood that previous orders entered regarding his license remained in effect and that the Commission could use the CPEP assessment to take further action.

1.4 An Amended Statement of Charges (Program No. 94-12-0034 MD) was served on the Respondent on October 11, 1996. In addition to alleging the previous charges under Program No. 86-07-0116 MD, the Commission, in part, alleged that the CPEP assessment demonstrated that the Respondent practices medicine in a manner that creates an unreasonable risk that patients may be

harmed. Also attached was a Confidential Schedule identifying Patients 1-22 which included Patients 1-20 that were identified in the previous Statement of Charges (No. 86-07-0116 MD). The cause numbers for the Amended Statement of Charges included both Program No. 86-07-0116 MD and Program No. 94-12-0034 MD.

1.5 On December 16, 1996, the Commission issued a Notice and Order of Summary Suspension which was based upon new allegations separate from those previously alleged. The Order of Summary Suspension suspended immediately the Respondent's license to practice medicine in the State of Washington. Attached to the new Statement of Charges (Program No. 96-07-0067 MD) was a Confidential Schedule identifying Patients 1-3 (hereinafter referenced as H.P., T.N., and H.N.).

1.6 A hearing was held on February 13, 1997 to consider the limitations of the summary suspension. On February 25, 1997, the Commission issued an Order Staying Notice and Order of Summary Suspension (Program No. 96-07-0067 MD). The suspension of the Respondent's license was stayed pending his compliance with conditions provided in that order.

1.7 The above Amended Statement of Charges (Program Nos. 86-07-0116 MD and 94-12-0034 MD) and the new Statement of Charges (Program No. 96-07-0067 MD) were consolidated and these proceedings were set for hearing.

## II. HEARING

2.1 In support of its case in chief, the Department called the following witnesses: John C. Peterson, M.D.; Stanley Stamm, M.D.; Robert Miller, M.D.; Thomas Swanson, M.D.; Jackie Bui; Virginia Renz; H.P.; L.N.; H.N.;

and T.N. The Department called Don Penrose as a rebuttal witness.

2.2 In support of his case in chief, the Respondent testified and called the following witnesses: Phuong Vo; Loan Thi Seeburger; Loc Nguyen; George Christian Harris, M.D.; Robert Burdick, M.D.; Ralph William Aye, M.D.; and Han Hlai.

2.3 The Department filed Exhibits numbers 1 through 15. The Department filed a Table of Contents listing its exhibits. The Department also filed a video tape of an evaluation by CPEP, which was identified as Department's Exhibit No. 16.

2.4 The Respondent filed Exhibits numbered 1 through 113. The filed exhibits were admitted, except for the following: Respondent's Exhibits Numbers 9, 10, 11, 12, and 101 (which were depositions); Number 98 (which was withdrawn); Number 100 (five audio tapes which were not filed); and Number 113 (which was withdrawn, because it was the same as Department's Exhibit No. 1). The Respondent filed an "Index of Exhibits for Respondent" which listed exhibits 1-112.

During the hearing, the Respondent also offered Respondent's Exhibits Numbers 113 through 119, of which the following were admitted:

> Respondent's Exhibit No. 113: letter from Thomas Swanson, M.D., to Virginia Renz, dated May 28, 1996 (two pages).
>
> Respondent's Exhibit No. 114: transcripts and lists of continuing medical education courses or Respondent (five pages).

Respondent's Exhibit No. 116: nine photographs of Respondent's medical office.

Respondent's Exhibit No. 117: six photographs of Respondent's medical office.

Respondent's Exhibit No. 118: memorandum from Donald Penrose to Robert Miller, dated January 24, 1996 (two pages), along with two one-page exhibits.

Respondent's Exhibit No. 119: four reference letters (six pages).

Not admitted was Respondent's Exhibit No. 115 which was provided during the hearing only for illustrative purposes.

2.5 In addition to the above referenced witnesses and exhibits, the Commission members were provided a procedural notebook which included the Issues for Hearing; the Amended Statement of Charges (Program Numbers 86-07-0016 MD and 94-12-0034 MD); the Notice and Order of Summary Suspension and the Statement of Charges (Program No. 96-07-0067 MD); the Respondent's Answers; and the Order Staying Notice and Order of Summary Suspension (Program No. 96-07-0067 MD).

## III. FINDINGS OF FACT

Based on review of the exhibits admitted, the testimony presented at the hearing, and argument of counsel, the Commission hereby makes the following Findings of Fact:

3.1 In 1984, Bang Duy Nguyen, M.D., the Respondent, started a private practice in Seattle, Washington.

The Respondent characterized his practice as a general practice treating all members of the family. At all times material to this action, Respondent, has been licensed to practice medicine by the State of Washington.

**THE 1989 STIPULATION AND AGREED FINAL ORDER**

3.2 As a result of an Order of Summary Suspension and Statement of Charges (Program No. PM 5603) filed against the Respondent, the Board issued a Stipulation and Agreed Final Order on April 22, 1989 (1989 Agreed Final Order). In an Agreed Statement of Facts, Respondent agreed that he had provided care to patients which fell below the acceptable standards of care in the areas of charting, diagnosis and treatment, referral, and prescription and administration of medication. The Agreed Statement of Facts also stated that the Respondent's office had not been maintained in a state of cleanliness and sterility that is adequate to meet acceptable standards of medical practice.

3.3 Under the 1989 Agreed Final Order, the Respondent's license was indefinitely suspended, but the suspension was stayed and probation granted provided that the Respondent comply with the listed terms and conditions A through N, including the following:

> 4.1(A) Respondent shall ensure that all care delivered to patients falls within acceptable standards of medicine.
>
> 4.1(F) Respondent shall keep a log of all surgical procedures he performs, including minor surgery; pelvic examinations, and procedures involving invasive instrumentation.

3.4 Under condition C, the Respondent's practice was to be supervised by Robert Burdick, M.D., pursuant to the terms of a written Preceptorship Agreement. Under condition D, John C. Peterson, M.D., was to review 30 patient charts per quarter, which were to be selected at random from the Respondent's patient records.

**The Preceptorship Under the 1989 Agreed Final Order.**

3.5 Under the Preceptorship Agreement, Dr. Burdick was to review each patient encounter that the Respondent had the previous week. He was also required to review the cleanliness of the Respondent's office and to write a report at the end of the review and to submit a report on a quarterly basis. The Preamble to the Preceptorship Agreement listed a goal and an objective. The goal was to see that the Respondent practiced with reasonable skill and safety as a reasonably prudent physician would. The objective was to educate the Respondent as the reviews progressed. Through discussions with the preceptor about each patient encounter, the Respondent was to be educated.

3.6 Robert E. Burdick, M.D., practices at the Polyclinic in Seattle, Washington. He has been licensed to practice medicine in Washington since 1968. He is board certified in internal medicine and medical oncology. He signed the Preceptorship Agreement on April 22, 1989. He hoped to help the Respondent get through the "morass of western medicine." He described the Respondent as a man with a big heart, but who had very little insight in the practice of medicine as we know it. He stated that the Respondent had less than an average fund of knowledge. He stated that the Respondent did not understand the business of medicine and was naive about the investigative bodies looking into his practice. The Respondent was trained in "third world

medicine" and Dr. Burdick hoped to help the Respondent improve his practice.

3.7 During the first two years of the preceptorship from 1989 to 1991, Dr. Burdick came to the Respondent's office every week and reviewed 200 to 230 charts per week. In 1991, Dr. Burdick felt the Respondent made a lot of progress and his monitoring activities could be diminished. The Board met to review the Respondent's practice and agreed to reduce the preceptor's review to 20 patients per month. Dr. Burdick did this from 1991 until January 1996, and came to the Respondent's office once a month.

3.8 Dr. Miller was a medical consultant for the Board and Commission and supervised Dr. Burdick's preceptorship. Dr. Burdick reported his findings to Dr. Miller on a regular basis until the Board's order in 1991 that reduced the preceptor's review obligations. After the 1991 Board Order, Dr. Burdick's reports were not submitted on a quarterly basis. The last report from Dr. Burdick was in 1994. Dr. Miller felt that Dr. Burdick's reports were not adequate in that they did not give enough of a review of the Respondent's practice to be helpful to identify areas where there might be discrepancies. Nevertheless, the reports did meet the requirements of the preceptorship agreement.

3.9 Dr. Burdick testified that the charges were trivial and marginal. He stated that he was familiar with the Respondent's practice and described it as a "tweener" practice. That is, the Respondent practices between Western practice and what is practiced in the "third world" such as Costa Rica, Taiwan or the Philippines. Dr. Burdick further described it as a triage practice like that practiced in the United States at a CHEC Medical Center in that the Respondent would see the patient for a single visit and treat

the patient's acute illness, but would not know whether the patient would return for follow up treatment.

**Patient Chart Reviews Under the 1989 Agreed Final Order.**

3.10 John C. Peterson, M.D., practices internal medicine, family medicine and geriatrics. He practices at the Roosevelt Medical Center in Seattle, Washington and has been practicing medicine since 1972. He is Board Certified in Internal Medicine and Family Practice.

3.11 Dr. Peterson has had extensive experience in reviewing other physicians' records. Starting in 1974, he became involved with the Professional Standards Review Organization with the state medical association. Until 1996, Dr. Peterson was involved as the medical director of a peer review organization, which was the largest in the country and encompassed a region covering over 33 states. Dr. Peterson has reviewed thousands of physicians' records.

3.12 Dr. Peterson reviewed records of the Respondent in accordance to the 1989 Agreed Final Order. He submitted a report of his findings on January 3, 1994 and supplemental report on April 30, 1994. Dr. Peterson found the quality of the Respondent's documentation was improving, but he continued to find major substantial deficiencies. Dr. Peterson testified to the treatment received by Patient 1 through Patient 20, and opined that the treatment received by these patients was clearly below the standard of care.

**THE AMENDED STATEMENT OF CHARGES DATED OCTOBER 11, 1996**

3.13 As a result of the Department's continued review of the Respondent's practice, the Department served an Amended Statement of Charges (Program Cause Nos. 86-07-0116 MD and 94-12-0034 MD). The Department alleged, in part, that the Respondent's conduct was unprofessional in his treatment of twenty-two patients, hereinafter referred to as Patient 1 through Patient 22. (For identification of Patients See, Confidential Schedule attached to Amended Statement of Charges.) The Department also alleged that the Respondent failed to comply with the 1989 Agreed Final Order.

**The Amended Statement of Charges; Paragraphs 3.2 and 3.3**

3.14 Under paragraph 3.2 of the Amended Statement of Charges, the Department alleged that the Respondent kept no immunization records, developmental charts or growth charts on pediatric Patients 1, 2, and 3. Under paragraph 3.3 of the Amended Statement of Charges, the Department alleged that for Patients 1-20, the Respondent kept no problem list, medication list or list of allergies, even when the allergies were noted in the progress notes.

3.15 When Dr. Peterson reviewed the charts in 1993, he found no immunization records, no developmental charts or growth charts for pediatric Patients 1, 2, and 3. He testified that this information is one of the more important parts of the records for the care providers. These charts help the provider make sure the child has achieved developmental milestones and that the child has had the proper immunizations. Thus, the care provider can, in some cases,

predict acute illnesses or prevent illnesses from being repeated. For Patients 1 through 20, Dr. Peterson also found that the Respondent failed to have the allergy, problem, and medication lists in the charts.

3.16 Although Dr. Peterson found these important chart records absent, the Respondent testified that these documents were, for the most part, in the patients' charts. The Respondent maintained that Dr. Peterson did not get a copy of these charts when his office staff made copies for Mr. Penrose, the Department's investigator who arranged to pick up the charts. The Respondent testified that he asked Mr. Penrose if he could have his office staff copy only the progress notes in the charts, since Mr. Peterson has been reviewing his cases for many years. The Respondent testified that Mr. Penrose agreed to this copying arrangement. According to the Respondent, the alleged lack of the documents in question was just a mistake of not providing Dr. Peterson with the complete file.

3.17 The Respondent further explained that when he opened his office in 1984, he did not have these forms, because he did not know he needed them. He started his clinic like a walk-in clinic to address acute problems. But when he started to treat managed care patients in 1992, he then instructed his staff to complete these charts. When questioned if the charts were created after Dr. Peterson reviewed the charts, the Respondent stated "I don't think so."

3.18 Donald A. Penrose testified that he went to the Respondent's office to collect 20 patient records, which were selected on a random basis. The Respondent and an office staff person were present when he requested the complete office file, "front to back." He testified that he did not say anything about progress notes. He told them when they were finished copying the charts, he would come by to pick them

up and take them over to the reviewing physician. He was informed by the office person that she would make the copies.

3.19 Dr. Burdick testified that the Respondent should not be criticized for his failure to include these forms in the patients' charts, because he was running a triage type practice like that conducted at walk-in clinics. Dr. Burdick maintained that other walk-in clinics would not be criticized for not having an immunization chart because they would not expect the patient to come back. Dr. Burdick believed it was 1995, not 1992, when there was a change to managed care in which such charting was being required.

3.20 The Commission disagrees that the Respondent's actions should be excused because the Respondent practices triage medicine like a walk-in clinic. Contrary to the Respondent's contention, the Commission finds that a number of the patients came to Respondent several times over a two and three year period. The Respondent's practice was a typical family practice where a physician would treat new patients the same as his regular patients would be treated. Further, the Respondent's actions should not be excused because the nature of his practice was that of a "tweener." The relevant standard is whether the Respondent was practicing within the standard of care for physicians in Washington State.

3.21 The Commission also finds that entries in the problem lists provided by the Respondent at the hearing were dated after Dr. Peterson reviewed the charts. For example, in the problem list for Patient 1, there was a entry made for rhinitis dated April 30, 1994 and for a viral condition dated February 20, 1995. These dates were after Dr. Peterson reviewed the records. Respondent's Exhibit No. 16. In response to questions concerning when these forms were put

in the patient charts, the Respondent stated that he did not know, but they were completed by his staff after 1992 or 1993 to implement managed care requirements. This response is inconsistent with Dr. Burdick's testimony that managed care was implemented in 1995. If that was the case, then these forms would have been added to the patient charts after Dr. Peterson's review.

3.22 The Commission finds that the immunization records, developmental or growth charts, problem lists, and list of allergies were added to the patient charts after Dr. Peterson's review of Patients 1-20. The Respondent admitted that medication lists were not completed, but the medications were stated in the progress notes. Mr. Penrose asked for copies of all the records which were made by the Respondent's office staff. The Commission does not find credible the Respondent's testimony that only the progress notes were copied for Mr. Penrose. The patient records reviewed by Dr. Peterson contained lab reports and other sets of information. This does not explain why other chart documents were copied from the patient charts in addition to the progress notes, but the immunization records, developmental charts or growth charts, the problem lists and the list of allergies were not copied.

3.23 The Commission finds that for Patient 1-3, the Respondent failed to keep immunization records, developmental charts or growth charts. The importance of keeping these records is the ability to monitor the growth of the child to make sure that developmental landmarks are achieved and that growth and development of the child is within the normal range. The growth charts are used not only for the growth of a baby. The percentiles of height and weight are also used for children. If the child is not within the expected range, it is the first sign that something is wrong, either physically or mentally. The Respondent's conduct was

below the standard of care and created an unreasonable risk that Patients 1-3 could have been harmed.

3.24 The Commission finds that for Patients 1-20, the Respondent failed to keep problem lists, medication lists, or lists of allergies. The purpose of having such lists is to ensure that any other practitioners can inspect the chart and immediately know the medications, the allergies and the reasons for the patient coming to see the physician. This allows a medical provider to respond quickly to medical inquiries and, if necessary, to emergencies. The Respondent's conduct was below the standard of care and created an unreasonable risk that Patients 1-20 could have been harmed.

**The Amended Statement of Charges; Paragraph 3.4**

3.25 Under Paragraph 3.4 of the Amended Statement of Charges, the Department alleged that the Respondent inappropriately gave flu shots to Patient 1, a ten-year-old girl. On October 11, 1991, Patient 1 was seen for a boil on her head and was given an flu shot. On October 31, 1992, Patient 1 was seen for a rash and was given a flu shot. Dr. Peterson testified that there was no documentation to justify putting this child at significant risk by giving her a flu shot. Dr. Peterson testified that this failure to provide appropriate justification in the chart was a violation of the standard of care. Dr. Burdick testified that flu immunizations are regularly provided for any patient who wishes to decrease his or her chance for getting influenza. The Commission finds that there should have been appropriate documentation for providing the flu shots to Patient 1. However, the Commission finds that such conduct did not create an unreasonable risk that Patient 1 might be harmed.

**The Amended Statement of Charges; Paragraph 3.5**

3.26 Under Paragraph 3.5 of the Amended Statement of Charges, it was alleged that the Respondent's conduct was unprofessional in that he failed to coordinate Patient 4's medications with another physician and that he prescribed medications that were highly likely to increase Patient 4's symptoms. The Respondent treated Patient 4 for significant depression and gastritis. The allegedly inappropriate prescriptions included, but were not limited to: Fioricet, Meprobamate, Naprosyn, Motrin, Lodine and Inderal.

3.27 Dr. Peterson reviewed the Respondent's records for Patient 4 from April 1992 to December 1993 and testified that the sequence of progress notes demonstrated that the Respondent inappropriately prescribed sedatives for a patient with significant depressive illness. On April 10, 1992, Patient 4 had complaints indicating depression, yet the Respondent prescribed, along with other medications, Meprobamate, which is a tranquilizer that may increase depression. On March 24, 1993, the Respondent prescribed Fioricet for Patient 4's headaches. Fioricet contains a depressant chemical. The Respondent also prescribed Inderal, which was contraindicated for Patient 4 with a depressive illness.

3.28 Dr. Peterson testified that Patient 4 also had a diagnosis of gastritis with a mild anemia and he criticized the Respondent use of non-steroidal drugs. He was also critical of the way medications were prescribed and the lack of documentation of what happened with Patient 4 as a result of these medications. On August 11, 1993, Patient 4 was complaining of no menstrual periods and a painful wrist. The Respondent prescribed Naprosyn. The Respondent did not mention in the charts the reasons why Patient 4 was being

prescribed a non-steroidal anti-inflammatory medication, which has a very high likelihood of worsening the problems of gastritis, about which Patient 4 had complained of in multiple visits before. On August 23, 1993, Patient 4 was seen because of a gastrointestinal upset. The Respondent diagnosed depression and tendonitis of the wrist and prescribed Motrin, a non-steroidal that also has the side effects of gastrointestinal bleeding and gastritis. On November 26, 1993, Patient 4 was seen for a complaint of headache, low back pain and wrist problem. Along with Inderal, the Respondent prescribed Lodine, which is a non-steroidal and is not indicated for a patient with gastritis and anemia. The Respondent saw Patient 4 for a follow up visit on December 9, 1993, but there was no mention in the chart about any follow up or any side effects regarding Lodine or Inderal on Patient 4.

3.29 Concerning the Respondent's treatment of Patient 4, who had a diagnosis of gastritis and depression, Dr. Peterson opined that the Respondent prescribed medications that were known to have side effects and complications that made Patient 4's original condition worse, and that this conduct violated the standard of care.

3.30 The Respondent stated that he had been seeing Patient 4 since 1992 when she came to this country. On April 10, 1994, he prescribed Meprobamate because the patient was having anxiety and a panic attack. The Respondent testified that he did not have the time to document this anxiety, which he observed. He recognized the importance of stating in the chart the reasons for prescribing the medications or switching medications, but stated he did not have the time. The Respondent also testified that patients from the Asian community who have just come to the United States frequently have anxiety to which depression is the secondary problem.

3.31 The Respondent maintained that he took into account the side effects of the medications he prescribed for Patient 4's gastritis. When she came back and complained of dyspepsia and stomach pains, the Respondent stated that he looked for side effects. He maintained that individuals who have just come from Vietnam encounter stomach problems because of their change in diet.

3.32 Dr. Burdick testified that Patient 4 clearly has a combination of depression and agitation, or an agitated depression. The psychological evaluation in Patient 4's chart also supports this conclusion. He maintained that the Respondent considered the potential side effect of the medications prescribed. Concerning the inappropriate gastritis medication, Dr. Burdick maintained that the Respondent was treating Patient 4's complaints of a painful arthritis, which was disabling. Dr. Burdick maintained that the medications were appropriate, even though Patient 4's stomach was sensitive to the non-steroidal and anti-inflammatory medications being prescribed.

3.33 The Commission finds that the Respondent testified that Patient 4 was anxious, and the Respondent admitted that he failed to document the patient's anxiety in the records. Dr. Peterson did not find anxiety charted in the records; the records only recorded that the patient was depressed. The Commission finds that based upon the diagnosis of depression, the Respondent prescribed medications to Patient 4 that were highly likely to increase her depressive symptoms. Further, the Respondent made a diagnosis of gastritis and did some blood work, which showed some blood loss anemia. The Respondent not only failed to treat Patient 4 for a blood loss anemia, but also prescribed medications that were highly likely to cause gastrointestinal bleeding and ulceration.

3.34 The Commission finds that the Respondent's treatment of Patient 4 violated the standard of care and created an unreasonable risk that she may be harmed. Even assuming that the Respondent's argument that Patient 4 had a diagnosis of anxiety, the failure to document this diagnosis was a violation of the standard of care and created an unreasonable risk that she might be harmed.

**The Amended Statement of Charges; Paragraphs 3.6, 3.12, and 3.16**

3.35 In Paragraphs 3.6, 3.12 and 3.16 of the Amended Statement of Charges, the Department alleged the Respondent's conduct was unprofessional in that he failed to provide patient education or counseling to avoid allergens.

3.36 On September 3, 1993, the Respondent saw Patient 4, a 52-year-old woman, with a rash and diagnosed a possible seafood allergy. On January 17, 1992 and January 4, 1993, the Respondent saw Patient 10, a 43-year-old man, and diagnosed a possible seafood allergy. On June 4, 1993, the Respondent saw Patient 12, a 26-year-old woman, that presented a condition of hives and was diagnosed with a seafood allergy.

3.37 Dr. Peterson testified that there was no documentation that these patients had been informed or counseled about the allergy, what the problem was, and ways to avoid the allergen in the future. Dr. Peterson opined that the Respondent's failure to provide and document any education or counseling for a possible seafood allergy violates the standard of care.

3.38 The Respondent agreed with Dr. Peterson that he should have documented his action on the progress notes.

He maintained that Vietnamese are accustomed to eating a traditional seafood, in which the fish sometimes becomes a little spoiled after it sits in a jar for a few weeks. Sometimes they have some minor itching after eating this seafood. He maintained that many Asian families have this problem, that it is not serious, and that they do not care, because to them it is good food. The Respondent testified that he does not pay too much attention to this kind of allergy.

3.39 Dr. Burdick agreed with the Respondent that it is the Respondent's practice to counsel his patients about the possible allergy. Dr. Burdick also agreed that if the patients' reactions were a result of the seafood being improperly stored and they became ill after eating it, then the seafood could be tainted with toxins causing food poisoning or toxicity and thus would not be an allergic reaction.

3.40 The Commission finds that the Respondent failed to document and to provide patient education, referral or counseling to avoid the allergen or the toxins. The Respondent should have counseled Patients 4, 10 and 12, even though he insisted that it was a common problem from eating this traditional seafood. If he was not willing to provide the counseling, then he should have referred them to someone who would do the counseling. The Respondent's conduct violated the standard of care and created an unreasonable risk that these patients may be harmed.

**The Amended Statement of Charges; Paragraph 3.13**

3.41 In Paragraph 3.13 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional because not only did he failed to provide the proper counseling for the allergen, but also the Respondent failed to recognize that a patient's symptoms could be caused by a reaction to prescription medication.

3.42 On December 5, 1991, Patient 11, a 42-year-old man with a rash and hives, was seen by the Respondent and was diagnosed to have a seafood allergy. On February 17, 1992, he was seen for a pain problem and was given Tolectin, which is a non-steroidal anti-inflammatory. On February 21, 1992, he again came in with rash and hives and was diagnosed to have a seafood allergy. On May 13, 1993, he was again seen for a rash and was diagnosed for a seafood allergy.

3.43 Dr. Peterson testified that there was a lack of documentation of counseling and education for the allergy for each of these visits. Further, on February 21, 1992, the Respondent also failed to provide in the record that the patient's reaction might be due to the Tolectin. This medication has a high side effect profile for an allergic reaction and may have been one of the causes of the patient's allergic reactions and rashes. Dr. Peterson testified that this failure to consider the possible cause was below the standard of care.

3.44 The Respondent testified that if the allergy was more serious, he would have provided some counseling and would have given Patient 11 an injection. The Respondent stated that he did not document the counseling. He testified that the allergy was not serious and that the seafood is part of the patient's daily food.

3.45 The Commission finds that the Respondent did not recognize that the symptoms of Patient 11 could be caused by a reaction to Tolectin, which could cause a rash or allergy type symptoms. The Respondent failed to order any allergy testing to determine the etiology of the problem. The Commission finds that the Respondent's conduct was below the standard of care in that he failed to provide the counseling

for the allergen and failed to pursue a diagnosis that the patient's symptoms could be caused by a reaction to prescription medication. The Respondent's conduct also created an unreasonable risk that Patient 11 might be harmed.

**The Amended Statement of Charges; Paragraph 3.7**

3.46 In Paragraph 3.7 of the Amended Statement of Charges, the Department alleged that that the Respondent's conduct was unprofessional in that the Respondent inappropriately prescribed Patient 5 a non-steroidal anti-inflammatory medication, which was potentially dangerous, due to the patient's documented history of gastrointestinal intolerance. Further, the Department alleged that the Respondent failed to obtain a guaiac stool culture to diagnose intestinal bleeding.

3.47 Dr. Peterson described a series of visits over a four month period, from August 11, 1993 to December 3, 1993, that indicated an inappropriate and potentially dangerous prescribing of drugs and that the Respondent violated the standard of care for this type of patient. On August 11, 1993, Patient 5, a 39-year-old man, was initially seen for abdominal pain, gastrointestinal bleeding and nausea. The working diagnosis was colitis. There was a statement in the records that the patient could not afford blood test or stool culture. No stool guaiac test was done. The Respondent prescribed an antibiotic, ordered a change in diet with no dairy products and asked the patient to return in ten days. Two days later, Patient 5 returned with chest pain, dizziness and blood in the stool. His hematocrit was 23 and his hemoglobin was 7.7. The Respondent prescribed Nitroglycerin and Trimethsulfa. No stool guaiac test was done. Patient 5 was seen eight days later with no chest pain, but with fatigue and low back pain. The Respondent prescribed Naprosyn, a non-steroidal anti-inflammatory

medication, but there was no documentation regarding the anemia and gastrointestinal bleeding. On December 3, 1993, Patient 5 had anemia with palpitations, but no blood count or hematocrit was obtained, no Hemoccult test or test for rectal bleeding were taken and no rectal exam was performed.

3.48 The Respondent testified Patient 5 came to him with abdominal pain with mucus and blood in stool with no apparent cause. He did not order a stool guaiac test, because it was obvious that the Respondent had blood in the stool and so this test was not necessary. The Respondent stated that for any new patient, he wants to do a general blood test, but many patients do not want to pay the $200 deductible. The Respondent testified that the non-steroidal anti-inflammatory medication was prescribed when the colitis was clear. The Respondent did not recommend sigmoidoscopy or anything similar because many of his patients do not have transportation, cannot communicate well, and do not want to go to a specialist unless it is very serious. Here, he tried to handle the case first. The Respondent stated that he is a little behind in considering signs of cancer in this area of the body. He stated it was not much seen in Vietnam and he is now learning to be alert to this concern. .

3.49 Dr. Burdick testified that Patient's 5's symptoms were due to colitis which is an inflammation of the lower colon, and had nothing to do with the upper gastrointestinal track. He stated that non-steroidal anti-inflammatory drugs only injure the upper gastrointestinal track, the stomach and duodenum, and only in some cases cause ulceration and bleeding. Thus, he contends the criticism that Respondent inappropriately used a non steroidal anti-inflammatory drug was unwarranted. Further, Dr. Burdick maintained that the Respondent appropriately concluded that the patient had a lower gastrointestinal

problem from the blood in the stool and the stool guaiac test was not necessary.

3.50 The Commission rejects Dr. Burdick's testimony. There can be blood in the stool with upper GI bleeding. In addressing the problem of rectal bleeding, the Respondent noted blood and mucus in the stool, but nothing in the chart said bright red blood. The Respondent admitted that he may have been mistaken in assuming that the blood was from the lower part of the gastrointestinal track. The Commission finds that on August 11, 1993, Patient 5 presented with symptoms of abdominal pain with mucus and blood in the stool without apparent cause. Here, the patient had hemoglobin of 7.7 and a hematocrit of 23. There are indications of moderate anemia and when blood is seen in the stool, there should be a great deal of concern. The patient returned on August 13, 1993 with chest pain from no apparent cause at exertion. His hemoglobin was 7.7, and his hematocrit was 23.4, yet there was no further work up on this anemia and bleeding.

3.51 The Commission finds that even though it may not have been necessary to do the guaiac stool culture, the Respondent failed to conduct further diagnostic investigation of the gastrointestinal bleeding. Even if one of the differential diagnosis may have been colitis, the Respondent's failure to provide further testing and treatment is glaringly absent. The Respondent also inappropriately prescribed a non-steroidal anti-inflammatory which was potentially dangerous. The Commission finds that the Respondent's treatment of Patient 5 was below the standard of care and created an unreasonable risk that Patient 5 might be harmed.

**The Amended Statement of Charges; Paragraph 3.8**

3.52 In Paragraph 3.8 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that he failed to prescribe antibiotics despite symptoms indicating their appropriate use, prescribed a narcotic cough syrup without appropriate symptoms and prescribed an anti-inflammatory drug that was contraindicated.

3.53 Dr. Peterson reviewed records of office visits related to Patient 6, a 13-year-old deaf boy. On March 28, 1992, he had asthma, a temperature of 100 degrees and enlarged tonsils. The Respondent prescribed Sudafed and Tylenol, but did not prescribe antibiotics. On April 11, 1992, Patient 6 was seen again with asthma, a temperature of 102 and enlarged tonsils. He was again given Sudafed and Tylenol. and no antibiotics were prescribed. On June 3, 1992, Patient 6 was seen again with asthma, no fever and enlarged tonsils. He was given Amoxicillin, oral polio vaccine and a vaccination. On December 5, 1992, Patient 6 was seen with an upper respiratory illness and was prescribed Anaprox and Phenergan with Codeine with cough syrup. Dr. Peterson testified that neither of these medications were indicated because Patient 6 had an asthmatic disease, atopic dermatitis and now, has a cough and respiratory illness. Anaprox, which is a non-steroidal anti-inflammatory medication, could cause harmful side effects such as a brochial spasm. Further, with this type of patient, Phenergan with Codeine is a very aggressive treatment for a cough when it is not accompanied with an antibiotic, chest x-ray, blood counts or other mechanisms to help identify the etiology of Patient 6's illness.

3.54 Dr. Peterson testified the Respondent's treatment of Patient 6 was indicative of a practice of

prescribing medications that were contraindicated on the basis of documentation. There was no treatment for significant febrile illness for an asthmatic patient, who may have benefited with antibiotic therapy because the high fever and physical signs were suggestive of a bacterial infection. Dr. Peterson testified that the Respondent's treatment of Patient 6 was not consistent with the standard of care in the community.

3.55 Dr. Burdick testified that the Respondent's treatment of Patient 6 with antibiotics was not mandatory, and that the use of narcotic cough syrup was appropriate. Dr. Burdick testified that only in an asthmatic patient who has had a prior history of sensitivity to aspirin, should further use of aspirin, or non-steroidal anti-inflammatory agents, be contraindicated. Here, Patient 6 had no history of prior sensitization to aspirin or non-steroidals and the medications were appropriate.

3.56 The Respondent testified that ordering a blood test for children is difficult to do, because often the family refuses to have it drawn. He stated many Asian patients do not like the blood to be drawn when they are sick. The Respondent also did not see a need to do a blood test. In regards to not prescribing antibiotics, the Respondent thought the asthma was exacerbated by a virus so antibiotics would have had nothing to do with this case. The Respondent stated that he did not see any signs of bacterial infection, such as green or yellow nose discharge or sputum.

3.57 The Commission finds that the Respondent did not respond appropriately in treating Patient 6's fever. The Respondent failed to do a strep screen and failed to perform follow up diagnostic testing to determine whether he needed to treat a virus or a bacteria. He failed to prescribe antibiotics, consider other specific therapy, or establish a

working diagnosis for treatment. Next, the Commission finds that the Respondent prescribed an anti-inflammatory drug, aspirin, that was contraindicated. Aspirin can trigger an acute episode of asthma and the Respondent, by prescribing anything with aspirin to an asthmatic, indicated a basic lack of understanding of that side effect. The Commission finds that the Respondent's conduct was below the standard of care and created an unreasonable risk that Patient 6 might be harmed.

3.58 Finally, the Commission finds that prescribing a narcotic cough syrup was not necessarily inappropriate depending on the patient's condition at that time, but the Commission would not recommend it. A narcotic cough syrup for an asthmatic is not inappropriate, but is contraindicated when the patient is having an asthmatic attack. It was not clear from the records whether Patient 6 was having an asthmatic attack or not. Although the Commission does not find this treatment below the standard of care, it considered it inadvisable and dangerous for a 13-year-old to have available this narcotic cough syrup when he is having an asthma attack.

**The Amended Statement of Charges; Paragraph 3.9**

3.59 In Paragraph 3.9 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that Respondent never requested liver function tests and did not attempt to verify compliance with tuberculosis therapy.

3.60 On September 21, 1993, the Respondent treated Patient 7, a 55-year-old woman, who complained of stiff joints, low back pain and a rash. She also had a cavitary tuberculosis, which was treated with Isoniazid and Pyridoxine. On October 6, 1993, Patient 7 returned and

complained of headache, dizziness, and tingling in the arms. The Respondent diagnosed a viral upper respiratory infection. On December 6, 1993, Patient 7 returned and complained of rhinitis.

3.61 Dr. Peterson testified that many of Patient 7's symptoms were possible side effects from the medication considering her age. The use of the anti-tuberculosis therapy could have been the cause of her complaints. On September 21, 1993, the Respondent failed to request liver function tests. The liver test would show whether the patient was suffering from the side affects of Isoniazid (INH) therapy. On October 6, 1993, the Respondent prescribed analgesics which contained chemicals that aggravate liver function when the liver is being adversely affected by the INH therapy. Dr. Peterson testified that this series of three visits, September 21, 1993, October 6, 1993 and December 6, 1993, showed that the Respondent violated the standard of care by not ordering indicated laboratory testing or by not investigating to see if Patient 7 was complying with her INH therapy.

3.62 Dr. Burdick testified that the Respondent did not have any obligation to order the testing, or find out whether it had been done, because Patient 7 was receiving ongoing treatment for tuberculosis from the King County Public Health Department, and these patients are closely followed for their tuberculosis treatment.

3.63 The Respondent testified that Patient 7 was being seen at his office for other problems. He did not check for medication toxicity and did not investigate for medication compliance for her tuberculosis treatment. The Respondent stated that the county public health department is managing the patient's tuberculosis therapy and they do not like physicians interfering in their treatment. The Respondent

admitted that he did not send Patient 7 to the county public health department after she presented symptoms of Isoniazid toxicity.

3.64 The Commission finds that Patient 7 produced symptoms of a possible reaction to Isoniazid, a reaction that can shut down the liver entirely. He failed to do a liver function test or, in the alternative, he failed to verify that she was in compliance with her tuberculosis therapy. It is not acceptable to say that it is someone else's responsibility when he is presented with these symptoms and when he is the primary care physician. The Respondent's conduct violated the standard of care and created an unreasonable risk that Patient 7 might be harmed. Further, the Respondent violated the standard of care by prescribing analgesics for dizziness when these medications can aggravate liver function when the liver is being adversely affected by the INH therapy.

**The Amended Statement of Charges; Paragraph 3.10**

3.65 In Paragraph 3.10 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that he failed to repeat a hemoglobin A1C test, or that he did not inform Patient 8 of the result or its significance.

3.66 On November 13, 1993, Patient 8, a 42-year-old woman, came to the Respondent to discuss her concerns about diabetes. Test results showed that her blood glucose was normal, but her hemoglobin A1C was elevated. The Respondent also saw Patient 8 on November 20, 1993 and again on December 4, 1993, and did not repeat the test, do a glucose tolerance test, or inform her of the abnormal result.

3.67 Dr. Peterson testified that on November 13, 1993, when Patient 8 came to the Respondent concerned

about having diabetes, her blood glucose was normal, but the hemoglobin A1C was elevated at 7.9 (the upper limit of normal is considered 6.0). She was seen a week later for yeast vaginitis. There was no indication in her chart that she was informed of the elevated A1C test results. The Respondent did not order the test or state a reason why the test was not repeated. On December 4, 1993, Patient 8 came with a chief complaint of dyspepsia and dysmenorrhea. There was still no mention in her chart of any discussion of the abnormal hemoglobin A1C test results. Dr. Peterson testified that this is a violation of the standard of care.

3.68 Dr. Burdick testified that when the Respondent saw Patient 8, he did a blood test and saw that she had a normal blood sugar and a slightly elevated hemoglobin A1C, which is a test used to track patients with diabetes and under treatment. Dr. Burdick maintained that the Respondent is being criticized for not being more aggressive in diagnosing diabetes. Dr. Burdick stated that he would not have followed up on a further test to substantiate diabetes concerning a patient in the same circumstances.

3.69 The Respondent testified that in November 1993, he did do a diabetic screen for Patient 8 and the hemoglobin A1C was a little elevated, which indicated that she may have diabetes in early stages. He did not follow up as he should have, such as ordering a glucose tolerance test. He did order a urine test, but did not document any counseling because this patient is "like a relative." She is still a patient, but the Respondent does not recall if she is diabetic.

3.70 The Commission finds that Patient 8 was concerned about diabetes. Test results showed that she had a hemoglobin A1C result of 7.9. A test result of 6-6.5 is in the upper limits of normal and a result of 6.5-7.5 is suspicious of early diabetes. Patient 8 was also being treated for vaginitis

and cervicitis. These are illnesses and infections that are increased in the presence of a diabetic state and are frequently seen with someone in a diabetic state. The diagnosis of diabetes should have established, one way or another, to ascertain her overall picture. The Respondent did not repeat the test, nor inform Patient 8 of the results or its significance. He admitted that he did not repeat the test. He also did not document any counseling in the chart. A physician performing a blood test is responsible for informing the patient of the results, abnormal or not. Here, when the Respondent did not inform Patient 8 of the significance of the results, he denied the patient an opportunity to get a second opinion. The Respondent also did not do a glucose tolerance test. The Respondent admitted that a glucose tolerance test should have been done and he did not do it. The Respondent did do a urinalysis test, but such a test is practically worthless unless the diabetic is in a severe condition. The Respondent's conduct in treating Patient 8 in November-December 1993 was a violation of the standard of care and created an unreasonable risk that Patient 8 might be harmed.

**The Amended Statement of Charges; Paragraph 3.11**

3.71 On December 4, 1993, the Respondent gave Patient 9, a 20-year-old male, an HIV/AIDS test. In Paragraph 3.11 of the Amended Statement of Charges, the Department alleged that Respondent's conduct was unprofessional in that he did not provide information required by law, and did not have the patient fill out an informed consent form. The Department also alleged that the Respondent did not provide post-test counseling or document that he informed the patient of the results.

3.72 Dr. Peterson testified that the Respondent saw Patient 9 on July 9, 1993 for a fungal infection and prescribed anti-fungal and anti-inflammatory medication. On August 5,

1993, the patient was seen for complaint of diarrhea and then on December 4, 1993, the patient was again seen for diarrhea and weight loss and received an HIV test. On the review of the record there was no informed consent for this testing, no pre-test counseling, no post-test counseling and no evidence that the patient had been informed of the results. Dr. Peterson testified that these are violations of the standard of care for this procedure and testing, and a violation of Washington state law requiring counseling and informed consent.

3.73 When Dr. Burdick first testified, he assumed that Patient 9 was the Respondent's son and that the Respondent had counseled with his son the implications of HIV testing. However, Patient 9 was not the Respondent's son. Once this misunderstanding was corrected, Dr. Burdick agreed that the Respondent is obligated to counsel patients.

3.74 The Respondent testified that the consent form was not signed because he was unaware that he should have had this form. In 1993, most of his patients requested the testing and so he did not see the necessity of the counseling. He assumed that Patient 9 was aware of the potential consequences and implications from HIV testing. When the HIV test results came back, he looked at it, initialed it, and he asked his staff to let the patient know, but he did not document it in the chart as he should have.

3.75 Concerning the HIV/AIDS testing for Patient 9, the Commission finds that the Respondent's conduct was below the standard of care when he failed to provide informed consent and to provide post-test counseling, to obtain an informed consent form, and to document that the patient had been informed of the results. The Respondent's conduct created an unreasonable risk that Patient 9 might be harmed.

**The Amended Statement of Charges; Paragraph 3.14**

3.76 In Paragraph 3.14 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that the Respondent did not provide any education or counseling regarding an abnormally high blood sugar reading and in that the Respondent did not discuss with Patient 11 the possibility of repeating the test or doing other tests.

3.77 On June 12, 1992, Patient 11 was found to have a blood sugar of 152. Dr. Peterson testified that there was no indication in the patient records for this date that Patient 11 was educated or counseled that the blood glucose test was abnormal, or that it should have been repeated in the future after fasting. The Respondent saw Patient 11 for three additional visits from June 12, 1992 to December 7, 1993, yet there was still no documentation that the Respondent had discussed with the patient the possibility of repeating the test or doing other tests. Dr. Peterson testified that this conduct was a violation of the standard of care.

3.78 Dr. Burdick testified that there was no information in the chart of the blood glucose test results in relation to when the patient had eaten, which was significant because blood glucose of 160 or below can be expected within two hours after ingestion of a meal. Dr. Burdick also pointed out that latter tests showed that this patient's blood glucose over the next two years were within the normal range. Thus, he testified the criticism of the Respondent was unwarranted.

3.79 The Respondent testified that he did do a blood test and the glucose result was 152. In his notes, he stated the result was high and he requested his staff call him back for a follow-up. The patient did come back in

September 1992, but the Respondent saw from his chart notes that he did not follow up on the blood glucose. The Respondent had returned for a different reason; in that he had a sore in his mouth, pain in neck and shoulder, and was complaining of insomnia and anxiety. Patient 11 did not indicate problems related to a high blood glucose.

3.80 Concerning Patient 11, the Commission finds that the Respondent's conduct was below the standard of care and created an unreasonable risk that Patient 11 might be harmed. Normal glucose results should be between 75 and 115 in a fasting state or two hours after a normal meal. A blood glucose reading of 152, not knowing when the last meal was taken, is abnormal and deserves attention. The Respondent did not provide any education or counseling, did not discuss the possibility of repeating the test or doing other tests.

**The Amended Statement of Charges: Paragraph 3.15**

3.81 In Paragraph 3.15 of the Amended Statement of Charges, the Department alleged that on or about November 23, 1993, Patient 11 told the Respondent that his wife was a hepatitis B carrier. Patient 12 tested positive for hepatitis A and B. In the Amended Statement of Charges, it stated that the Respondent did not inform the "patient" of the test results, and did not provide any follow up to the positive hepatitis tests results.

3.82 The Commission found that Paragraph 3.15 of the Amended Statement of Charges was ambiguous. It was alleged that the Respondent did not inform the "patient" of the test results. The Commission could not determine whether the "patient" was Patient 11 or Patient 12 that the Respondent was alleged to have failed to inform of the test results. Due to this ambiguity, the Commission was unable to

make a finding regarding the Respondent's conduct under Paragraph 3.15 of the Amended Statement of Charges and so this charge should be dismissed.

**The Amended Statement of Charges; Paragraphs 3.17, 3.18, 3.19 and 3.20**

3.83 In Paragraphs 3.17 through 3.20 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that he failed to comply with the 1989 Agreed Final Order by his failure to log pelvic exams he performed on Patients 4, 12 and 16.

3.84 The log book is like a pocket calendar where he writes the patient's name, date and what surgical procedure he performed. Department's Exhibit Nos. 14 & 15. The Respondent admitted his failure to make the log entries, stating he was too busy and forgot. Nevertheless, he maintained that the pelvic exams are recorded in the progress notes. The Commission finds that the Respondent did not comply with the 1989 Agreed Final Order by not making log entries for Patients 4, 12 and 16 for the pelvic exam he performed on August 11, 1993, May 18, 1993 and November 17, 1993, respectively.

**The Amended Statement of Charges; Paragraphs 3.21 and 3.22**

3.85 In Paragraphs 3.21 and 3.22 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that on or about February 16-23, 1994, the Respondent failed to approve and return phone calls for a heart defect surgery for a five-year-old child, Patient 21.

3.86 Dr. Stanley Stamm, M.D., is a pediatric cardiologist at Children's Hospital Medical Center. He testified that Patient 21, a five-year-old boy, was diagnosed with congenital heart failure and needed surgery within a year's period. Dr. Stamm testified that his notes were sent to Columbia Health and to the Respondent. Patient 21 was readmitted to the hospital for surgery on February 23, 1994, but the Respondent would not approve his surgery and the patient had to be discharged. He testified that in February 1994, the child was not at risk for heart failure, but there was persistent risk of pulmonary hypertension, of too much blood flow going through his lungs and of bacterial infection or endocarditis occurring in his heart. Dr. Stamm testified that he tried to contact the Respondent by phone, but did not get any response. The Respondent did not come to the phone and did not return Dr. Stamm's telephone call. Patient 21 was readmitted for surgery, which occurred on August 3, 1994, had successful results and later recovered well. Dr. Stamm testified that the patient's health was not jeopardized as a result of the surgery being delayed until August 1994.

3.87 The Respondent referred Patient 21 to Children's Hospital. His office received a phone call from Children's Hospital for approval, but was informed that it was not an emergency. He had not received any reports from Children's Hospital and thus, under the managed care plan, he could not provide approval for the surgery. He stated all reports were sent to the Columbia Medical Center, another managed care program of which Patient 21 was also a patient. He did not receive any records until later. Finally, Patient 21's insurer became involved and the surgery was approved.

3.88 The Commission finds that the Respondent referred Patient 21 to Children's Hospital. The Commission finds that there was a misunderstanding involving insurance carriers and that the Respondent was not receiving timely

medical reports. The Commission finds that the Respondent's conduct was within the standard of care for a physician.

**The Amended Statement of Charges; Paragraph 3.23**

3.89 In Paragraph 3.23 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that in January and February 1994, the Respondent failed to follow up with a school nurse and an insurer on a plan to conduct neuro-developmental testing for Patient 22, a 11-year-old girl.

3.90 Thomas M. Swanson, M.D., Ph.D., is a pediatrician who practices in Seattle, Washington. He was asked by the Respondent to evaluate Patient 22. He found that this child had neurological problems and recommended that the child be referred for evaluation at the University of Washington (UW). He communicated this to the Respondent by letter and by telephone. He had no further contact with Patient 22 and did not know whether she went to the UW for an evaluation. Dr. Swanson did not know whether the Respondent followed up on this referral.

3.91 The Respondent testified that he received records on Patient 22 from the psychologist, the UW Medial Center and from Swedish Medical Center. Patient 22 was seen by Dr. Swanson and the Respondent received his letter. He testified that Patient 22 received follow up care from a neurologist. He stated that he was not aware of any communication problem with the school nurse. The Commission finds that the Respondent's action during his referral of Patient 22 was within the standard of care.

**The Amended Statement of Charges; Paragraph 3.24**

3.92 In Paragraph 3.24 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that, pursuant to an Agreed Order dated December 12, 1995, the Respondent's performances at a professional skill assessment program demonstrated that he may practice medicine in a manner that creates an unreasonable risk that patients may be harmed.

3.93 The Respondent attended CPEP (Colorado Personalized Education for Physicians), a professional skills assessment program, from January 11-12, 1996. During this assessment, an objective independent review panel tested and observed Respondent's professional skills in a neutral and controlled environment. Under the Agreed Order for CPEP Assessment and Technical Assistance Visit, dated December 12, 1995, the Respondent promised to appear at CPEP for an assessment and evaluation. The report was to be made available to the Commission. Respondent's Exhibits Nos. 102 and 103. During the hearing, the Commission watched a CPEP video presentation of the Respondent examining two patients. Department's Exhibit No. 16.

3.94 The Respondent testified about his experience at CPEP. Concerning the charts reviewed at CPEP, the Respondent asked his staff to pick the charts at random and send them. He thought he would be getting some education and did not review the charts in advance. He felt there was some misunderstanding because the interviewers at CPEP did not communicate well. He felt that they did not understand his background and the type of patients that he treats. He became lost in his driving around Denver and appeared late for some appointments. The Respondent was aware of the importance of the assessment to him and that the report would

go back to the Commission. The Respondent felt that CPEP was not helpful and he did not learn anything.

3.95 The Respondent also testified about the video presentation from CPEP. He stated that his communication was not as clear as it should have been. He did not explain any other difficulties with the exams which he conducted on the two patients. During the hearing, a panel member asked the Respondent about his use of a tuning fork during the video presentation. The Respondent stated he used it to test the patient's sensation. He seldom used a tuning fork in his office and would feel more comfortable sending the patient to a specialist for the neurology problem.

3.96 The Commission found that during the video from CPEP that the Respondent's performance fell below the standard of care. During one exam, the patient effectively told the Respondent his diagnosis; that is, the Respondent was told by the patient that he had a severe blood pressure problem. During his exam, the Respondent did not take the patient's blood pressure, did not ask pertinent questions about dizziness or headaches, and did not check the patient's carotid pulse. The physical exam was not conducted appropriately for examining a patient with hypertension. In addition, the Respondent used a tuning fork inappropriately under his assertion that he was conducting a neurological test. Further, the Commission observed that the Respondent failed to use an ophthalmoscope correctly.

3.97 The Commission has reviewed the 18 page evaluation from CPEP. Department's Exhibit No. 1. The evaluators raised the issue of the Respondent's role in his community. The Respondent expressed frustration that his patients are not willing to accept Western medical practices, that he is in a "no win" situation and that there is nothing he can do to change the nature of his practice. The CPEP

evaluators found the Respondent's charting deficient. The Commission finds that the CPEP report demonstrated that the Respondent practices medicine in a manner that creates an unreasonable risk that patients may be harmed.

**The Amended Statement of Charges; Paragraph 3.25**

3.98 In Paragraph 3.25 of the Amended Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional as reported from an inspection conducted at the Respondent's office. The Commission finds that the Department failed to present any testimony or evidence in support of this allegation and that it should be dismissed.

**The Amended Statement of Charges; Paragraph 3.26**

3.99 In Paragraph 3.26 of the Amended Statement of Charges, the Department alleged that Respondent's conduct was unprofessional in that billing irregularities occurred. The Commission finds that the Department failed to present any evidence or testimony in support of this allegation and that it should be dismissed.

**THE DECEMBER 16, 1996 STATEMENT OF CHARGES**

3.100 The Department alleged that the Respondent engaged in unprofessional conduct during the exams of three patients, H.P., T.N., and H.N. These patients and a social worker testified for the Department. Dr. George Christian Harris, a psychiatrist, testified for the Respondent.

**The December 16, 1996 Statement of Charges; Paragraphs 3.2 and 3.3**

3.101 In Paragraphs 3.2 and 3.3 of the December 16, 1996 Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that during exams of H.P. on May 6, 1995 and May 12, 1995, the Respondent engaged in sexual contact. The Department also alleged that the exam was not logged in the Respondent's log book.

3.102 H.P. is 15- years-old and lives in Seattle with her parents and siblings. She has lived in the United States for about five years and previously lived in Vietnam. For the past two years, she has been under the care of a woman physician, but before then, the Respondent was her physician for about a year-and-one-half. She had seen two other physicians before the Respondent. She saw him the first time when she had a cold. During the first few exams, H.P. could not remember anything unusual about them and they did not bother her.

3.103 H.P. testified about the exams by the Respondent that did bother her. This was when she told the Respondent that her stomach hurt. H.P. testified that the Respondent made a lot of notes in the chart. She was on the examining table which was across from his desk. No one else was in the examining room. The Respondent did not say anything before the exam. He put the stethoscope under her shirt and listened to her heart. He then lifted up her shirt to her neck and touched her breast. He put one hand on her breast, used three fingers and "kind of squeeze it." He was looking at her breast and was not speaking to her. The touching lasted for 1 or 2 minutes and bothered her.

She did not ask him why he was touching her that way. She had never had a breast exam like this before. Then he pushed her pants down low to the genital area and squeezed her stomach. Then he did not say anything, put some pills in a package and gave them to her. He did not say what kind of pills they were. After the exam, she felt dirty, uncomfortable and angry and did not like it. She did not say anything to the Respondent, because she was afraid.

3.104 A week later, H.P. saw the Respondent again. She again went alone. She waited in the exam room for quite a while, and when the Respondent came in, he asked her what was wrong. She told him that she still had stomach aches and that the medications did not help. No one else was in the exam room and she was on the exam table. She was wearing a T-shirt, sweat shirt, jacket and sweat pants. Like the last time, the Respondent pulled up her shirt to exam her chest. He touched her breast like the prior visit. The Respondent told her to lie down on the table. He told her that he would pull down her pants, she was scared. She did not answer, so he pulled down her pants down to her knees. After he pulled her pants and underwear down, he touched her "lower parts." She stated that her legs were straight. The Respondent did not say anything when he was touching her genitals. She could not see what the Respondent was doing, but she said it felt funny and it tickled, it was very uncomfortable. She did not know if he touched inside her genitals or not. This lasted about one or two minutes. She stated he was "playing around" like touching, and she had not been touched like that before or since then. When asked to explain what she meant when she stated that the Respondent touched below her belly button, H.P. replied that she meant that the Respondent touched her around the opening to her vagina.

3.105 H.P.'s mother and father would sometimes take her to see the Respondent. On the last two times, she did

not go with her parents. When her mother came with her, the Respondent felt outside her T-shirt when he felt her stomach. For the last two visits, she had not complained about having periods or sore breast, she only complained of a stomach ache. At Harborview when she was examined, the examiner used some sort of tool and a microscope. At her last exam with the Respondent, he did not use anything. She did not think he had gloves on for the whole exam. She did not report it, because she did not want anyone to know and her mom would be upset, but then it continued to bother her. At a class at school, H.P. stated that they talked about the rape relief center. H.P. decided to call rape relief and to tell her mother. This was about a year after these two exams occurred. H.P. stated that she felt she was sexually molested.

3.106 L.N. is H.P.'s mother. L.N. testified that before her daughter told her about the incidents with the Respondent, she had noticed that H.P. was acting strangely. Her family was very close and touch each other; hugging was normal. L.N. had noticed that H.P. did not want to be close to her siblings. When her brother put her hand on her forearm just to touch her, she would become agitated and go to her room. Her daughter told her in the summer about the incidents and requested that she not tell anyone.

3.107 The Respondent testified about his usual procedures for examining a young female girl, age 12-14 years. He testified that he examines the genital area only if they have a problems and only after permission from their parents and the patient. If the patient has not had intercourse, then he just looks at the genital area and takes a swab; he does not put anything inside the vagina. Sometime he puts his little finger near the opening if he has seen some masses. If he suspects something, then he would send the patient to a specialist. If the patient wishes to have a chaperone, then he has his employee stay in the room during the exam.

3.108 The Respondent testified about his exams of H.P. He saw her on the following dates: April 3, 1995, May 6, 1995, May 8, 1995, May 12, 1995, and September 27, 1995. On April 3, 1995, H.P. came in because she had a cold. He was to do a well child exam because of managed care. He performed a complete exam. He asked her if she had any problems in her genital area. After she said no, then he wrote down no lesions and no masses. He prescribed Dimatap, did a urinalysis, a vision screen and hearing screen.

3.109 On May 6, 1995, H.P. came in with a complaint in her abdomen. He asked her what she thought was causing her pain. He started his exam by touching her abdomen. Normally, he touched the whole abdomen, including the area above her pubic area. He was feeling for any tenderness or masses. He did not touch her genitalia; he did not have her remove her pants or underwear. He said he told her what he was going to do. He wrote down abdomen was soft, no tenderness, no masses. The rest of the exam was negative. He ordered a blood test and gave her some medication for her stomach. He did not recall if she was alone. He told her to come back in one week.

3.110 On May 8, 1995, H.P. came back with the same complaint. He found out she did not take her medication. He asked her the reasons. He touched her stomach and found she had a lot of gas in her abdomen. He examined her on the exam table lying down. He did not have her disrobe. He did not pull her pants down to feel her abdomen, but he did put his hands inside her pants to feel her abdomen. He did not touch her anywhere else besides the abdomen. She did not complain of pain when he palpated her abdomen. He did not put his hand or finger insider her vagina. He concluded that she may have dyspepsia with a lot of gas. He changed her medication.

3.111 On May 12, 1995, H.P. came in with the same complaint. He wrote that she was still not taking the medications. He believed that he counseled her about taking the medication. He cannot recall if she came alone. He did not exam her vagina or her breast, because there was no need to do so. He told her to take her medications and ordered a screen for parasites. He asked her to return in ten days. She was to collect her stool and return it for stool testing. She did not return for follow up. The Respondent testified that May 12, 1995 was the last time she came to his office, even though he had earlier testified that H.P. visited his office on September 27, 1995.

3.112 Concerning H.P.'s accusations of sexual contact, the Respondent believed that H.P. may have been angry with him for becoming upset because she did not take her medications. When she attended the sex education programs at school, she used that information to get even. The Respondent admitted that he did raise his voice with her. He testified that H.P. did not complain to him about any of the exams. The Respondent denied having any sexual contact during the exams of H.P.

3.113 George Christian Harris, M.D., testified for the Respondent. He is a psychiatrist in Seattle, Washington and has been Board Certified psychiatrist since 1975. He has been certified as a sex offender evaluator and therapist. Dr. Harris interviewed the Respondent in May 1997 and reviewed exhibits, documents and depositions taken for this proceeding. He discussed those factors he would consider in the event of a pre-teen or a 42-year-old woman making an accusation of sexual misconduct. Although it is not always possible, he stated that it is best to interview all the individuals concerned before he can make a determination regarding credibility and whether inappropriate sexual contact

occurred. Dr. Harris did not talk with any of the alleged victims, but did read their depositions. Based upon his review of the records, particularly Dr. Rawlings' report and his interview of the Respondent, he came to the conclusion that there was no evidence that the Respondent misbehaved in terms of sexual conduct and in terms of his conduct as a doctor. .

3.114 The Commission heard the testimony of both H.P. and the Respondent. The Commission finds the testimony of H.P. credible and the testimony of the Respondent not credible. Watching the demeanor and the actions of H.P., during her testimony about the exam of her breasts and her vagina, the Commission was convinced that there was sexual contact of H.P. by the Respondent. The manner she described the breast exam and the touching of her vagina by the Respondent was convincing. There were no reasons why the physician would be examining a thirteen-year-old's breast in such a manner. The Respondent's actions of pulling her shirt up over her neck and her trousers down below her knees is not the sort of behavior a physician should be doing.

3.115 The Commission finds that the Respondent examined H.P., a thirteen-year-old girl. During the Respondent's exams of H.P. on or about May 6, 1995 or May 8, 1995, the Respondent engaged in sexual contact with H.P., including squeezing the patients breast's and removing her clothing. During the Respondent's exam of H.P. on or about May 12, 1995, the Commission finds that the exam included sexual contact with H.P., including squeezing the patient's breasts, removing her clothing, and fondling her genitals. This exam was not logged in the Respondent's log book. The Respondent's conduct fell below the standard of care and created an unreasonable risk that H.P. might be harmed.

**The December 16, 1996 Statement of Charges; Paragraphs 3.4 and 3.5**

3.116 In Paragraphs 3.4 and 3.5 of the December 16, 1996 Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that during the exams of Patient T.N. on November 19, 1994 and February 23, 1996, the Respondent engaged in sexual contact. The Department also alleged that the exam was not logged in the Respondent's log book.

3.117 Jackie Bui is from Vietnam, speaks Vietnamese and has lived in the United States for 17 years. She is employed at Youth Eastside Services (YES), a non-profit agency that provides counseling to high risk youths. She is a parent support specialist in their violence prevention program. Ms. Bui's first contact with T.N. was when she received a call from her school in early 1996. She went to school and counseled with her. Ms. Bui found T.N. to be a depressed, sad and quiet girl. Her English skills were very limited and she was very insecure about it. Ms. Bui spoke both English and Vietnamese with her. The next day T.N. attempted suicide by overdosing on medications. The school took T.N. to Children's Hospital and Ms. Bui transported the parents there.

3.118 Ms. Bui's role was to be a support person for T.N. and her family. Ms. Bui visited T.N. at Children's Hospital and after T.N. was discharged, Ms. Bui continued to meet with her. Ms. Bui arranged for T.N. to have a mentor. Ms. Bui was informed by the mentor that T.N. was talking about the Respondent. Ms. Bui went T.N.'s residence for a home visit to inquire further. Before contact with the mentor, Ms. Bui did not have any discussions with T.N. about the Respondent. Ms. Bui asked T.N. why she was talking with

the mentor about the Respondent. T.N. became very quiet and would not answer. The second time she asked, T.N. pointed down to her private area, her vagina. She was tearful and embarrassed. T.N. took a teddy bear and was hugging it. Ms. Bui asked T.N. to point on the teddy bear where the Respondent touched her. She pointed right between the teddy bear's legs. T.N. indicated in Vietnamese that the Respondent touched her at the "door" of the vagina. When asked how, T.N. replied that he touched her with two fingers with gloves on and she repeated the phrase "in and out, in and out." She also said that the Respondent was touching around her vagina with his hand. Ms. Bui told her that she had to report this conversation to authorities. Ms. Bui talked with her the next day and told her that she needed to talk to her parents.

3.119 The patient T.N. testified. She is 13-years-old and lives with her parents, brother and sisters. She stated that the Respondent was her physician from the end of 1994 to the end of 1996. She first saw the Respondent at the end of November 1994. He was her family physician. The Respondent was her uncle's doctor and so her family went to see him too.

3.120 After T.N.'s discharge from Children's Hospital for attempted suicide in February 1996, T.N. testified that she went to see the Respondent to see if any of the medicine was still in her system. At the Respondent's office, her father filled out some paper work so she could be examined. After waiting about an hour, the nurse took her for a blood test and to be weighed. Then the nurse took her to the physician's room. There was a writing table and an examining table. The Respondent was there and the nurse left. The door was closed.

3.121 T.N. told the Respondent that she was supposed to see if the medicine was still in her system. The Respondent did not say anything. He was just writing in his chart while T.N. was sitting on the exam table. T.N. came to the exam wearing jeans and a sweater. The Respondent asked her if she had menstruation and T.N. replied that it is not regular, sometimes she has it, sometimes she does not. He did not ask anything else. Following his instructions, T.N. took off all her clothes, but she contiued to wear her blouse.

3.122 The Respondent told her to lie on the exam table. T.N. stated that her legs were bending up and were spread apart. The feet were just resting on the exam table. The Respondent said he would examine the "opening of her body." T.N. used the term "opening of her body," because she was unfamiliar with the term vagina. T.N. did not say anything. He used his hand to touch T.N. at the "opening of her body." T.N. described the touching as a moving his hand "in and out" of the "opening of her body." He was using one hand to move "in and out" of her body and with his other hand, he was stretching the opening. He did not ask her how she felt. He told her that the "opening of her body" was normal. She saw his face when he looked at the "opening of her body," and said that his face was usual like all times. The exam of the "opening of her body" took 10 to 15 minutes.

3.123 After he examined the "opening of her body," the Respondent used a stethoscope to listen to her chest. She told him that when she looks at food, she feels nauseated. He wrote a prescription and told her to take it to her parents and then he opened the door. It was the Tet holiday and since she had recently come from Vietnam, the Respondent gave her $20 in Vietnamese lucky money and wished her a new year with happiness. T.N. came out to meet her father in the waiting room. She stated that she felt sad, but that she only told her father that the Respondent gave her a prescription.

T.N. did not return to the Respondent. T.N. also testified that during an exam before the time she overdosed on medication, the Respondent examined the "opening of her body."

3.124 The Respondent testified that the first time he saw T.N. was on November 7, 1994 in his old office. She complained of urination problems. Since she was on managed care, he needed to do a general check up. He did not do a breast or pelvic exam, except asking her if anything was wrong with her breast or her genitalia, and wrote that down on the chart. He wrote on the chart "no lesions and no masses." He did not make any notes about a breast exam. He asked her about her rectal area and she said nothing, so he noted negative. The Respondent ordered a urinalysis, an x-ray and other tests. When he received the lab test back, it showed that she had a urinary tract infection. He prescribed an antibiotic and gave it to her. He asked her to collect some discharge from her genitalia. He recalled that the whole family came. He told her to return in ten days. He did not examine her vagina or her breast. He did palpate her abdomen, from her pubic bone up. Generally, he raised her pants and put his hand on her skin. She came back two days later for an immunization on November 9, 1994 as required by her school. He did a vision and hearing screen. He completed the well child exam form. He did not examine her breast or vagina.

3.125 The next time T.N. came to the Respondent's office was on November 19, 1994. She came back for follow up on the x-ray that was negative. She complained of a stuffy nose. He examined her that day. He looked at her nose and throat. She was dressed in her own clothes. He listened to her lungs and heart by raising her shirt and putting the stethoscope on her skin, her back first and then the front. He did not recall if she had a bra. He did not do a breast exam.

He did not do a pelvic exam. He asked her if she had discharge and she said no. He put down in the chart that the pelvic exam was negative because of patient's answers to his questions. He palpated the abdomen from the pubic area up to her gastric area. He did not put his fingers, his hand or anything inside her. He repeated the urine test and prescribe antibiotics. He did not exam her breast nor her vagina.

3.126 The Respondent testified to his exams when T.N. came to his office on November 25, 1994, January 13, 1995, February 18, 1995, April 27, 1995, and October 28, 1995. The Respondent denied doing any vaginal or breast exams. On February 6, 1996, T.N.'s mother came in asking for medication for acne and for complaints of irregular menstruation.

3.127 The Respondent saw T.N. on February 23, 1996 about a week after T.N. took an overdose of her mother's medication. The Respondent had been notified from the emergency room at Children's Hospital of the overdose. With this kind of overdose, he was concerned about effects on T.N.'s heart which should be checked. During the exam, T.N. complained of pain in her abdomen and coughing. He examined her nose, throat, and ears. He listened to her heart by placing the stethoscope under her shirt on her chest and her back. Her heart was normal. He did not recall if she was wearing a bra. He did not do a vaginal exam, but palpated her abdomen, because she was complaining of pain in her abdomen. He palpated from her pubic area to her upper gastric area. There was no complaint of pain. She had her street clothes on. He reached inside her clothes to do the exam as she was lying on the examining table. He did not put his finger in her vagina and did not examine her breast. The Respondent also did some counseling and asked T.N. why she tried to kill herself. She did not appear to be upset; she was quiet and there was no

suicidal ideation; she denied any plan to kill herself. He did not recall any change in her mood. He charted 15 minutes for counseling and he referred her to mental health. He told her to return in ten days or to call if she had any difficulties. The Respondent denied having any sexual contact during his exam of T.N. The last time he saw T.N. was on February 23, 1996.

3.128 Concerning the accusations of sexual contact by T.N., the Respondent testified that he does not have any answer and he was surprised when she brought it up. He believed that she was misled by Jackie Bui, because T.N. has a very weak mind and is new in the country. T.N. was trying to please Ms. Bui and once she said it, she could not retract it. Ms. Bui was very zealous, tried to make it a big case so that she would be known in the community.

3.129 T.N. was not questioned about and did not testify about the alleged sexual contact during the exam on November 19, 1994. Those charges must be dismissed. However, there is a large discrepancy in the testimony concerning the Respondent's exam of T.N. on February 23, 1996. The Respondent testified that he never examined T.N.'s vagina. He testified that he examined her ear, nose and throat. He checked her heart and palpated her abdomen. He also counseled her about taking her mother's medication. The Commission has the obligation to determine what occurred during the exam on February 23, 1996. The Respondent's license is at issue and he has a motive to hide the truth. In contrast, there does not appear to be any reason for T.N. to fabricate a story that would be so embarrassing and difficult to tell. The evidence as presented does not allow the Commission to find that a misunderstanding occurred during the exam.

3.130 The Commission finds the testimony of T.N. credible and the testimony of the Respondent not credible. Observing T.N.'s demeanor while she testified, the Commission believed that T.N. was credible and that she had gone through a terrible experience in the form of sexual touching. The Commission finds that on or about February 23, 1996, the Respondent performed a physical exam on T.N., during which he had sexual contact with T.N. by fondling her genitals and by inserting his finger into her vagina in an "in and out" manner. The exam was not logged in the Respondent's log book. The Commission further finds that the Respondent's conduct on February 23, 1996 fell below the standard of care and created an unreasonable risk that T.N. might be harmed.

**The December 16, 1996 Statement of Charges; Paragraph 3.6**

3.131 In Paragraph 3.6 of the December 16, 1996 Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that during the exam of Patient H.N. on or about November 9, 1994, sexual contact occurred. The Department also alleged that the exam was not logged in the Respondent's log book.

3.132 H.N. was born and raised in Da Nang, Vietnam. She has been in the United States for about two-and-one-half years. She is the mother of T.N. She lives her with her husband and four children. The Respondent was her family physician when she first came to this country. He was their family doctor for about 18 months.

3.133 The first time she saw the Respondent, she told him she has had headaches and in Vietnam they could not treat it. She and the Respondent were the only persons in the room. He told her to take her shirt off to be examined.

She was standing by the examining table and when she had her shirt off, he unhooked her bra, put the stethoscope on her chest and put his hands on her breasts. He did not have gloves on when he was examining her breasts. After he examined her breasts, she buttoned up her shirt and he called the nurse in and told her to give H.N. a gown. She took off all her clothes and put on the gown. The nurse told her to lay on the table and the physician would come in. The Respondent came in and told her to scoot down and put her feet in the stirrups. The Respondent spread her legs and put his hand in her body. He asked her if she was happy when she had intercourse with her husband. When he examined her vagina, the paper robe was up over her knees and she could not see his hands. She was so scared that she closed her eyes. She was very afraid and embarrassed. She felt a hard object being inserted in and out. The in and out motions were continuous. While he was putting the hard thing in and out, he was also touching the top part of her vagina. She testified this lasted about 15 minutes or more, because when she was lying there, she would look up at the clock. She stated that she is pretty slow in becoming sexually excited, but when the Respondent examined her, she had an orgasm. She testified that she felt awkward and had difficulty accepting what was occurring. She testified that she had just come from Vietnam and thought this was how you were to be examined by a physician in America.

3.134 When he stopped examining her vagina, the Respondent told her to climb down from the table and to come stand next to him. At that time, she took off the paper gown and intended to put her clothes on. While he was writing a prescription, he asked her to come sit on his lap. H.N. said she did not sit on his lap. She felt uneasy and she hurried to put her clothes on. He asked how long she had the headaches and gave her a prescription. When she went back to the waiting room after being examined by the Respondent,

she had to go to the bathroom to comb her hair and wash her face, so she could look neat. She felt her face was too red and blushed to allow her to walk out right away. In describing the Respondent's actions, she used a Vietnamese term which was translated as "like harassing sexually, to bother sexually."

3.135 H.N. testified that she was examined by the Respondent many times, but on three or four occasions he examined her with the in and out motions in her vagina and each time she had an orgasm. When there were too many patients, the Respondent did not make her take off her clothes or get on the table. H.N. went to the Respondent a second time, because her husband had coordinated it with her brother-in-law, who could provide the transportation, and because she was still having headaches. During the second visit, the same thing happened as in the first visit. She told him she had a headache and he unhooked her bra and had her climb on the table where he put the "hard thing" in her vagina in an in and out motion. She went to the Respondent for a third time. She was still having the continuous headaches and she was hoping that he could do something about it. After she complained of her headaches, he again examined her vagina like the first visit. H.N. testified that she went to see the Respondent one further time, because she was suspicious that she was pregnant. The Respondent examined her vagina like the first exam and then told her she was not pregnant. After these exams, she was afraid of him, because she would complain of having headaches and he would examine her vagina.

3.136 When the Respondent was doing this exam, he asked her if it felt good. He also asked if she was tired or happy. H.N. did not tell him that she had an orgasm. When he asked her about her sex life with her husband, H.N. felt it was a very blunt question. He asked her how may times per week that she made love and whether it made her happy. He

did not say why he was asking these questions. He asked these questions many times. In Vietnam, a physician would never ask a question like that. One time, the Respondent told her he was examining for uterus cancer. She now has another physician. The last time she saw the Respondent was over a year ago; she cannot remember specifically when her last visit was.

3.137 The idea of going to another doctor occurred to her for a long time. She was fearful when he examined her. She did not know you could change physicians. She complained to her husband, but did not tell him the reasons, because it would have been too awkward. H.N. went to the Respondent because she would go with her brother-in-law, who referred the family to the Respondent. She also was aware that the Respondent would usually give free medicine, and when you were busy or not able to take your children, you could tell him the symptoms of the person who was sick and he would give you medicine.

3.138 After she found out what had occurred with her daughter and had talked to Ms. Bui, to her friends and to her sister-in-law, H.N. stated that she realized that the Respondent was not following the law. H.N. had thought that since her daughter was only 12-years-old, the Respondent would not perform similar exams on her. T.N. talked to her about the Respondent's exams after T.N. had overdosed on the medication. When T.N. talked about the Respondent's treatment, T.N. was sad and she cried.

3.139 The Respondent testified about his examinations of adult female patients. He focuses his attention on cancer of the breast and uterus, because his mother had breast cancer and his mother-in-law died of cancer in the cervix. He is aware that his patients from Vietnam have not been screened for cancer. When he checks

for cancer with non-educated female patients from Vietnam, they think you have a dirty mind, because you check for cancer in the breast and in the cervix. With new patients from Vietnam, he takes more time to exam them.

3.140 The Respondent testified about his exam of H.N. The Respondent first saw H.N. on November 9, 1994. She was 41-years-old and came in complaining of headaches, sleep disorder, and vaginal discharge with itching. In the beginning of the exam, the Respondent took her history and complaints. She was sitting on the exam table and he was sitting or standing next to his desk. He looked at her head, ears and nose. He then listened to her lungs and heart. He asked her to lie down and he palpated her abdomen. He did not do a breast exam. Since she was having problems with her genitalia, he advised her that he would conduct a pelvic exam. Since H.N. was new to this country, the Respondent tried to examine H.N. with her clothes on. Most of his patients are very shy and do not want to be exposed. When it was time to do the pelvic exam, the Respondent asked the nurse to give her a gown. Usually, the nurse asked the patient if she would like a chaperone. In this case, the nurse left. When he started the pelvic exam, the Respondent sat down on the chair facing her genitals and he explained what he would do. She may see his face. He remained on the stool for the whole genital exam. He looked at her vagina, her pubic hair and palpated her vulva. He told her he would put a speculum inside and told her he would open her up and look at her cervix and get a specimen from her cervix. She did not have any questions. He palpated around her vagina and looked for tenderness or masses. He used a speculum to look deep inside. She did not have any response. He looked for discharge or lesions. He took some discharge and a pap smear. He wore gloves during the exam. After he took the speculum out, he put his finger inside and palpated inside. He found discharge and erosion on her cervix and he

discussed his findings with her. He also drew some blood for testing. He said he asked if she was uncomfortable when he did this, or if she was tired or tense.

3.141 The Respondent testified that most of his patients are not use to this type of exam and it can be stressful. He asks the patients about their sex history. He felt it was his duty to find out. He asked H.N. if it was painful or pleasurable during intercourse with her husband in order to find out about possible tenderness inside her vagina. He wrote her a prescription, handed it to her and she left. He asked her to come back, because he sent the discharge for testing. He did not ask her to sit on his lap. He did not grab her buttocks and did not manipulate any part of her body during the exam. He did not recall if she got dressed in front of him.

3.142 The Respondent testified that he examined H.N. for ten more times from November 14, 1994 to the last time he examined her on February 6, 1996. The Respondent testified that he performed three pelvic exams on H.N. The first time was on November 9, 1994. On direct examination, he testified that he did not do a pelvic exam on January 21, 1995. However, on cross examination, and after looking at the log book, the Respondent corrected his testimony and stated that he did a complete pelvic on January 21, 1995. This was the second pelvic exam. The Respondent stated that H.N. had had erosion in her cervix and he wanted to followed up to see if this was resolved. On March 3, 1995, he wanted to do a pelvic exam, but she refused. She missed her periods, and so he wanted to find out if there were any problems or if she was pregnant. The third pelvic exam occurred on February 6, 1996. He did a routine pap smear and annual exam. The Respondent denied having any sexual contact or sexual gratification during any of his exams of H.N.

3.143 The Commission heard the testimony of H.N. and the Respondent. The Commission found the testimony of H.N. credible and the Respondent's testimony not credible. Along with her testimony, the Commission found that H.N.'s demeanor and manner appeared to be sincere in her explanation of her actions and what occurred. The Commission finds that on or about November 9, 1994, the Respondent performed a physical exam on H.N., a 41-year-old mother of four children. The exam included sexual contact with the patient, including squeezing the patient's breasts, removing her clothing, fondling her genitals, and inserting his finger into her vagina. The Respondent asked the patient unwarranted sexual questions. The Respondent asked the patient to sit on his lap after this exam. The exam was not logged in the Respondent's log book. The Commission finds that the Respondent's conduct on November 9, 1994 was below the standard of care and created an unreasonable risk that H.N. might be harmed.

**The December 16, 1996 Statement of Charges; Paragraph 3.7**

3.144 In Paragraph 3.7 of the December 16, 1996 Statement of Charges, the Department alleged that the Respondent's conduct was unprofessional in that he aided an unlicensed person to practice as a health care worker. The Department did not present any evidence in support of this allegation, and the Commission finds the allegation should be dismissed.

**THE RESPONDENT'S TRAINING AND HIS PRACTICE**

3.145 The Respondent received his medical training at the Saigon Medical School in Vietnam. His training was under the French System and he was in school for seven

years. After graduating, he was drafted in the Vietnam Army in 1968, and worked in hospitals treating military personnel and their families. After the Communists took over, he was in prison for three years. In 1978, he left Vietnam and went to Thailand. The Respondent came to the United States in November 1979 and at first worked in Virginia. He then moved to California to work in a Veterans Hospital for 4-5 months, which included internship training. From 1981 to 1984, he was employed at a geriatric hospital in Louisiana where he started as a staff physician, but then began to accept more administrative duties and supervised nurses and other employees.

3.146 Most of his patients are from Southeast Asia and do not speak English. The Respondent maintains that it is difficult to practice Western medicine with his patients. They seldom honor the appointment schedule and do not have transportation. It is difficult to follow up on treatment and to educate his patients about Western medical practices. He maintained that his patients have a very lax attitude about taking medication. Currently, he sees about 30 to 35 patients per day. At his office, the Respondent has three employees, a receptionist, a medical assistant and an office clerk for billing.

**TESTIMONY ON RESPONDENT'S REPUTATION IN THE COMMUNITY**

3.147 The Respondent presented witnesses in support of his character. Ms. Vo Phuong lives in Seattle and came from Vietnam. She testified that in the Vietnamese community, the Respondent is seen as a very thorough and caring doctor. Loan Thi Seeburger testified that she came from Vietnam in 1975 and met the Respondent about 15 years ago. She testified that the Respondent is known to be a very generous, respectful and helpful person. Loc Nguyen is a

pharmacist in Seattle, Washington. He knew the Respondent before he came to the US. He testified that the Respondent has a good reputation in the Laotian, Cambodian, Vietnamese and Chinese community. Ralph William Aye, M.D. practices at Swedish Hospital and has had referrals from the Respondent. Based only on his working relationship with him, Dr. Aye was impressed by the Respondent's clinical judgment. Some of the Respondent's exhibits were also statements in support of the Respondent's reputation and character.

**FINDINGS REGARDING SANCTIONS**

3.148 Although the Department did not present testimony on recommendations for sanctions, the Assistant Attorney General argued in closing that the Respondent's license should be revoked for ten years. In the alternative, the Department asked that Respondent be suspended indefinitely pending his completion of a residency program.

3.149 Dr. Burdick testified that the Respondent's primary problem is that he does not have the fund of knowledge that other physicians have. He recommended that the Respondent should enroll in the Georgia Academy of Family Practice continuing education course, which is a two-year home study course covering new subjects every two to three months. The Respondent would take a written test and if he passed, then he would move on to another subject. The Respondent should also attend the continuing education courses provided by the local hospitals every week. There should be a proctor assigned to him to review charts, report every six months on the Respondent's performance and compliance with the education course. The Respondent should report the education courses he has attended. Dr. Burdick recommended that the Respondent should continue to have a chaperone for female patients.

Dr. Burdick also recommended that the Respondent should limit his daily patient load to 35 per day, plus emergencies.

3.150 The Commission finds that Dr. Burdick's recommendations reflect that the Respondent is in need of extensive training and supervision. While he has been practicing medicine, the Commission has attempted to provide appropriate safeguards to protect the public and to allow the Respondent opportunities to improve his fund of knowledge and practice skills. In spite of this opportunity, the Respondent failed to improve his practice skills, abused the public trust with patients and performed in a manner that created an unreasonable risk to patients that they might be harmed. The Commission can no longer permit the Respondent to practice under restrictions and at the same time be assured that the public is protected. The Commission considered lesser restrictive sanctions than revocation of the Respondent's license. The Commission finds that there are no lesser restrictive sanctions available and any sanctions short of revocation would be insufficient to protect the public.

## IV. CONCLUSIONS OF LAW

4.1 Pursuant to RCW Chapters 18.130 and 18.72 generally, the Commission has jurisdiction over the Respondent and over the subject matter herein. The Commission was established to act as a disciplinary body for members of the medical profession licensed to practice medicine and surgery in this state. RCW 18.72.010(1).

4.2 In weighing the evidence presented, the Commission required the Department to prove by a preponderance of the evidence that violation(s) occurred under the Uniform Disciplinary Act, chapter 18.130 RCW. WAC 246-11-520.

4.3 The Commission used its experience, competency and specialized knowledge to evaluate the evidence presented in this case. RCW 34.05.461.

**THE AMENDED STATEMENT OF CHARGES**

4.4 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.13 through 3.24, 3.26 through 3.57, 3.59 through 3.80, and 3.92 through 3.97, constitutes unprofessional conduct pursuant to RCW 18.130.180(4), which defines unprofessional conduct as

> Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed...;

4.5 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.13 through 3.24, 3.26 through 3.57, 3.59 through 3.80, and 3.92 through 3.97, constitutes unprofessional conduct pursuant to RCW 18.130.180(9), which defines unprofessional as:

> Failure to comply with an order issued by the disciplinary authority or an assurance of discontinuance entered into with the disciplinary authority.

In this case, the Respondent failed to comply with condition 4.1(A) of the 1989 Agreed Final Order which required that he ensure all care delivered to patients fall within acceptable standards of medical practice.

4.6 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.83 through 3.84, constitutes unprofessional conduct pursuant to

RCW 18.130.180(9). In this case, the Respondent failed to comply with condition 4.1(F) of the 1989 Agreed Final Order which required that he keep a log of all surgical procedures he performs, including pelvic exams.

4.7 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.25, 3.58, 3.81, 3.82, 3.85 through 3.91, 3.98 and 3.99, did not constitute unprofessional conduct under provisions (4) and (9) of RCW 18.130.180. The charges based upon the conduct found above in Paragraphs 3.25, 3.58, 3.81, 3.82, 3.85 through 3.91, 3.98 and 3.99 should be dismissed.

**THE DECEMBER 16, 1996 STATEMENT OF CHARGES**

4.8 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.100 through 3.143, constitutes unprofessional conduct pursuant to RCW 18.130.180(1) and (24), which define unprofessional conduct as

> (1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action...;
>
> (24) Abuse of a client or patient or sexual contact with a client or patient.

4.9 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.100 through 3.143, constitutes unprofessional conduct pursuant to RCW 18.130.180(4).

4.10 The Commission concludes that the Respondent's conduct, found above in Paragraphs 3.115, 3.130 and 3.143, constitutes unprofessional conduct pursuant to RCW 18.130.180(9). In this case, the Respondent failed to comply with condition 4.1(F) of the 1989 Agreed Final Order which required that he keep a log of all surgical procedures he performs, including pelvic exams.

4.11 The Commission concludes that the allegation that the Respondent's conduct was in violation of RCW 18.130.180(4) by engaging in sexual contact with T.N. on November 19, 1994 should be dismissed.

4.12 The Commission concludes that the allegation that the Respondent's conduct was in violation of RCW 18.130.180(9) by failing to log pelvic exams regarding H.P. on May 6, 1995 and regarding T.N. on November 19, 1994 should be dismissed.

4.13 The Commission concludes that the allegation that the Respondent's conduct was in violation of RCW 18.130.180(10), by aiding and abetting an unlicensed person to practice when a license is required, should be dismissed.

**SANCTIONS**

4.14 Upon a finding, after hearing, that a license holder has committed unprofessional conduct and after considering the parties' recommendations regarding sanctions, the Commission may issue an order providing for one or any combination of the following:

(1) Revocation of the license;
(2) Suspension of the license for a fixed or indefinite term;
(3) Restriction or limitation of the practice;
(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;
(5) The monitoring of the practice by a supervisor approved by the disciplinary authority;
(6) Censure or reprimand;
(7) Compliance with conditions of probation for a designated period of time;
(8) Payment of a fine...;
(9) Denial of a license request;
(10) Corrective action;
(11) Refund of fees billed to and collected from the consumer.

RCW 18.130.160.

4.15 In determining what action is appropriate, the Commission must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the Commission consider and include in the order requirements designed to rehabilitate the license holder or applicant. RCW 18.130.160.

4.16 Under provisions (2), (3), (4), (5) and (7) of RCW 18.130.160 cited immediately above, the Commission has already taken disciplinary action. In the 1989 Agreed Final Order, the Board suspended the Respondent's license indefinitely, but the suspension was stayed and probation granted pending his compliance with conditions provided. The Respondent was provided an opportunity for educational assistance under the preceptorship provided by Dr. Burdick. For additional training, the Respondent was required to attend

a week long family practice seminar once a year sponsored by the American Board of Family Practice. Further, it was agreed that Dr. Peterson would review patient charts on a quarterly basis. The charts were to be randomly selected. The Respondent was required to keep a log of all invasive procedures including pelvic exams. In the 1989 Agreed Final Order, the Board agreed to these conditions not only to protect the public, but also to provide the Respondent an opportunity for rehabilitation. Additionally, on February 25, 1997, the Commission ordered that the Respondent have a chaperone during the physical exam of all female patients.

4.17 Since the 1989 Agreed Final Order, the Respondent's practice has been under review by the Board and now the Commission. Although the Board and the Commission provided the Respondent an opportunity to improve and demonstrate his practice skills, there were serious questions raised about his ability to practice medicine. The Commission issued Statement of Charges on November 17, 1994. On December 14, 1995, the Commission and the Respondent entered into an Agreed Order for CPEP Assessment and Technical Assistance Visit .

4.18 The Commission reviewed the CPEP evaluation and observed the video evaluation from CPEP. The Respondent did not demonstrate adequate medical skills. During the CPEP evaluation video, the Respondent used a tuning fork inappropriately, failed to take the patient's blood pressure after the patient told him he had a history of hypertension and incorrectly used an ophthalmoscope. The Commission noted, in particular, a statement made in the CPEP evaluation, page 15:

> His treatment plans and diagnostic preferences were similar for many different clinical situations. There is a clear concern that he would be unable to

identify medical crises and be prepared to handle such, particularly pediatric cases. In other areas, he is merely out-of-date, with improvement needed in basic disease mechanisms, pharmacology, chronic disease treatments, and preventive health screening. Dr. Nguyen's score of 45% on the multiple choice exam supports these findings.

Department's Exhibit No. 1, page 15. The Commission considered the Respondent's testimony that he did not understand what was he supposed to do during the CPEP evaluation. Nevertheless, the CPEP evaluation report and the video demonstrated to the Commission that the Respondent still does not have the necessary skills to practice medicine with reasonable skill and safety.

4.19 An additional Statement of Charges was issued on December 16, 1996 alleging that the Respondent had sexual contact with three female patients. In an Order dated February 25, 1997, the Commission placed limitations on the Respondent's practice and required that the Respondent have a chaperone for every female patient. The Respondent was also required to provide a letter to all female patients notifying them for the reasons of the chaperone requirement. He was also required to have a notice posted in his waiting room informing patients of the chaperone requirement pursuant to the Commission's disciplinary action. After a full hearing concerning these complaints, the Commission has concluded that there was sexual contact and that his conduct was unprofessional.

4.20 Although provided many opportunities, the Respondent has failed to correct noted practice deficiencies. The Respondent has been notified of the necessity to improve his skills since the 1989 Agreed Final Order made findings that the Respondent had provided care to patients which fell

below the acceptable standards of care in the areas of charting, diagnosis and treatment, referral, prescribing and administering of medications. The Respondent has had more than sufficient time and direction by the Commission to improve his practice skills including patient care and charting. Yet the review by Dr. Peterson since the 1989 Agreed Final Order and the CPEP evaluation have demonstrated that the Respondent has not improved his charting skills. Although the Commission has provided every opportunity at its disposal to assist the Respondent and to ensure public protection, the Respondent has failed to log pelvic examinations, he has failed to chart properly and has demonstrated substandard medical care.

4.21 Dr. Burdick's testimony was inconsistent. On the one hand, he testified that his preceptorship was no longer necessary, because the Respondent provided adequate care for his patients and he compared the Respondent's practice to walk in clinics. Yet when asked about what sanctions the Commission should impose, Dr. Burdick recommended that 50 randomly selected charts at the Respondent's office be reviewed every six months, that he enroll in a home study for family practitioners, that he attend hospital educational courses and that he limit his practice to 35 patients per day. The Respondent has had the assistance of a preceptor, yet after that preceptorship was provided, additional monitoring was again being recommended. The Commission agrees with Dr. Burdick's opinion that the Respondent lacks the medical background and training that a physician normally has, that he lacks a fund of knowledge, and this makes the Respondent deficient.

4.22 In determining sanctions, the Commission considered as aggravating factors the Respondent's prior disciplinary actions, the number of violations found, the Respondent's lack of rehabilitation potential and his abuse of

trust with patients. The Respondent's license has been indefinitely suspended, but stayed and probation granted pending his compliance with the conditions provided under the 1989 Agreed Final Order. Since then, the Commission has found numerous violations of unprofessional conduct. The CPEP evaluation demonstrated that the Respondent needs extensive rehabilitation. Further, the Respondent abused his position of trust and made inappropriate sexual contact with three female patients, two of which were ages 11 and 13.

4.23 The Commission has the responsibility to protect the public to assure that such conduct does not occur in the future. While he has been practicing medicine, the Respondent has failed to improve his practice skills, has failed to demonstrate that he has the necessary skills to practice medicine with reasonable skill and safety, and has abused his position of trust. The Commission can no longer provide rehabilitation opportunities and allow the Respondent to practice, yet be assured that sufficient safeguards are in place to protect the public. The Commission considered lesser restrictive sanctions than revocation of the Respondent's license. The Commission consider imposing a fine, but did not find it appropriate. The Commission finds that there are no lesser restrictive sanctions available and any sanctions short of revocation would be insufficient to protect the public. The Commission concludes that the Respondent does not have the skills to practice safely within the community and his practice and behavior places his patients at risk of harm. The Respondent's license should be revoked for a minimum of five years.

## V. ORDER

Based on the foregoing Procedural History, the Hearing, the Findings of Fact, and Conclusions of Law, the Commission hereby ORDERS:

5.1 The Respondent's license to practice medicine and surgery in the state of Washington is REVOKED with no right to reapply for a least five years from the date of this Order.

5.2 The Respondent shall promptly deliver to the Commission his original license and current registration, including both the wall and wallet copy.

5.3 The charges of unprofessional conduct addressed in the above Conclusions of Law, Paragraphs 4.7, 4.11, 4.12 and 4.13, are DISMISSED.

THE PARTIES ARE FURTHER ADVISED:

As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-11-580, either party may file a petition for reconsideration. The petition must be filed within ten days of service of this Order with the Adjudicative Clerk Office, 2413 Pacific Avenue, P.O. Box 47879, Olympia, WA, 98504-7879 and a copy sent to the Medical Quality Assurance Commission, Department of Health, 1300 SE Quince, PO Box 47866, Olympia, WA 98504-7866. The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the Commission has not acted on the petition or served written notice of the date by which action will be taken on the petition.

"Filing" means actual receipt of the document by the Adjudicatiave Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(18).

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

DATED THIS __9__ DAY OF SEPTEMBER, 1997.

***Medical Quality Assurance Commission***

_____/s/_____
DAVID WILLIAMS, M.D., Panel Chair

I declare that today I served a copy of this document upon the following parties of record:

**BANG DUY NGUYEN, ED NEWCOMER, RALPH ALFIERI**, by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS _____ DAY OF SEPTEMBER, 1997.

_____
Adjudicative Clerk Office cc: **MARYELLA JANSEN**

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

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|---|---|
| In the Matter of the license to Practice Medicine of: | No. 86-07-0016MD<br>94-12-0034MD |
| Bang Duy Nguyen, M.D., | AMENDED STATEMENT OF CHARGES |
| Respondent. | |

The Administrator of the Washington Medical Quality Assurance Commission, upon designation by the Commission, states and alleges as follows:

## Section 1: LICENSE STATUS

1.1 At all times material to this Statement of Charges, Respondent has been licensed to practice medicine and surgery by the state of Washington.

## Section 2: CONFIDENTIAL SCHEDULE

2.1 The patients referred to in this Statement of Charges are identified in the attached Confidential Schedule.

## Section 3: FACTUAL ALLEGATIONS

3.1 Respondent entered into a Stipulated and Agreed Final Order dated April 22, 1989, in this case. The Agreed Final Order suspended Respondent's license to practice medicine for an indefinite period of time. The suspension was stayed pending satisfactory compliance with certain terms and conditions, including the following:

A. Respondent shall ensure that all care delivered to patients falls within acceptable standards of medical practice.

3.2 Respondent kept no immunization records, developmental charts or growth charts on pediatric patients 1,2, and 3.

3.3 For patients 1-20, Respondent kept no problem list, medication list, or list of allergies. This was true even when allergies were noted in the progress notes.

3.4 Patient 1, a 10 year old girl, was inappropriately given flu shots in 1991 and 1992.

3.5 Respondent treated patient 4, a 52 year old woman, during 1992 and 1993. The patient had significant depression and gastritis. Respondent failed to coordinate the patient's medications with her other physician. Respondent prescribed medications that were highly likely to increase this patient's symptoms. These prescriptions included, but were not limited to:

a. Fioricet for headaches on or about March 24, 1993.

b. Meprobamate on or about June 21, 1993.

c. Naprosyn on or about August 11, 1993.

d. Motrin on or about August 23, 1993.

e. Lodine and Inderal or or about November 26, 1993.

3.6 On or about September 3, 1993, Respondent diagnosed a possible seafood allergy in patient 4. Respondent did not provide patient education nor counseling to avoid the allergen.

3.7 Respondent treated patient 5, a 39 year old man, in 1993 for undiagnosed GI bleeding and anemia. Respondent inappropriately prescribed a non-steroidal anti-inflammatory, which was potentially dangerous to patient 5, due to his documented history of GI intolerance. Respondent failed to provide a guaiac stool culture to diagnose intestinal bleeding.

3.8 On or about March 28, 1992, patient 6, a 13 year old boy, presented with asthma, a 100 degree temperature, and enlarged tonsils. On or about April 11, 1992, patient 6 presented with asthma, a 102 degree temperature, and enlarged tonsils. Respondent failed to prescribe antibiotics for this patient despite symptoms indicating their appropriate symptoms. Respondent prescribed an anti-inflammatory drug that was contraindicated for this patient and condition.

3.9 Respondent treated patient 7, a 55 year old woman, on or about September 21, 1993. Patient 7 had cavitary tuberculosis, treated with isoniazid and pyridoxine. She complained of stiff joints, low back paint and a rash. The patient presented again on or about October 6, 1993 complaining of headache, dizziness, and tingling in the arms. Respondent diagnosed a viral upper respiratory infection. The patient presented again on or about December 6, 1993, with rhinitis. Respondent never requested liver function tests and did not attempt to verify compliance with TB therapy.

3.10 On or about November 13, 1993, patient 8, a 42 year old woman, visited to discuss her concerns about diabetes. Her blood glucose was normal but her hemoglobin 1C was elevated. On or about November 20, 1993, patient 8 visited Respondent again, but the tests were not repeated, and the patient was not

informed of the result or its significance. Respondent saw the patient again on December 4, 1993, and did no repeat the test, do a glucose tolerance test, or inform the patient of her abnormal result.

3.11 On or about December 4, 1993, Respondent gave patient 9, a 20 year old male, an HIV/AIDS test. Respondent did not provide information required by law, and did not have the patient fill out an informed consent form, not is it in the file. Respondent did not provide post test counseling or document that he informed the patient of the results.

3.12 On or about January 17, 1992 and January 4, 1993, Respondent diagnosed a probable seafood allergy in patient 10, a 43 year old man. Respondent did not provide patient education or counseling to avoid the allergen.

3.13 On or about December 5, 1991, February 21, 1992, and May 13, 1993, Respondent diagnosed patient 11, a 42 year old man, with allergy symptoms due to eating seafood. Respondent did not provide patient education or counseling to avoid the allergen. Respondent did not recognize that the patient's symptoms could be caused by a reaction to prescription medication. No allergy tests were performed.

3.14 On or about June 17, 1992, patient 11 had a blood glucose of 152. Respondent did notprovide any education or counseling regarding this abnormally high blood sugar. Respondent did not discuss the possibility of repeating the test or doing other tests.

3.15 On or about November 23, 1993, patient 11 told Respondent that his wife was a hepatitis B carrier. Patient 12 tested positive for hepatitis A and

B. Respondent did not inform the patient of the test results, and did not provide any follow up to the positive hepatitis tests.

3.16 On or about June 4, 1993, patient 12, who is identified on the confidential schedule attached hereto, presented with allergy symptoms secondary to eating seafood, and Respondent diagnosed a possible seafood allergy. Respondent provided neither education nor counseling to avoid the allergen.

3.17 On or about April 22, 1989, Respondent entered into a Stipulation and Agreed Final Order in this case. Paragraph 4.1 (f) of the Order requires:

Respondent shall keep a log of all surgical procedures he performs, including minor surgery; pelvic examinations, and procedures involving invasive instrumentation. A copy of the Log of Procedures, designated as Exhibit 2, is attached to this stipulation and Agreed Final Order and incorporated herein.

3.18 On or about August 11, 1993, Respondent performed a pelvic examination on patient 4. Respondent did not make a log entry for patient 4 for August 11, 1993.

3.19 On or about May 18, 1993, Respondent performed a pelvic examination on patient 12. Respondent did not make a log entry for patient 12 for May 18, 1993.

3.20 On or about November 17, 1993, Respondent performed a pelvic examination on patient 16. Respondent did not make a log entry for patient 16 for November 17, 1993.

3.21 On or about February 16, 1994, patient 21, a five year old boy, was admitted to hospital for surgery to

correct a heart defect. The surgeon attempted to reach Respondent by telephone to confirm insurance authorization for surgery. The surgeon was unable to reach Respondent by telephone, and Respondent did not return messages left for him.

3.22 On or about February 23, 1994, patient 21 was admitted to hospital again for surgery to correct a heart defect. The surgeon attempted to reach Respondent during the time period February 17 through February 23, 1994. Respondent did not speak with the surgeon during this time period, and did not provide approval for the patient's surgery. Patient 21 was discharged without surgery due to lack of approval from Respondent.

3.23 In January 1994, Respondent was contacted by a school nurse to authorize neurodevelopmental testing for patient 22, an 11 year old girl. Instead, Respondent referred the patient to a pediatrician, who referred the child for testing. Respondent did not follow-up the plan with this patient, did not refer the patient for a neurodevelopmental consultation, and did not return phone calls to the insurer to coordinate this patient's care.

3.24 Pursuant to the Agreed Order dated December 12, 1995 in this case, Respondent attended a professional skills assessment on or about January 11-12, 1996. During this assessment, an objective independent review panel tested and observed Respondent's professional skills in a neutral, controlled environment. The report of this assessment demonstrates that Respondent may practice medicine in a manner that creates and unreasonable risk that patients may be harmed.

3.25 Pursuant to the Agreed Order dated December 12, 1995 in this case, representatives of the Department of Health conducted an inspection of Respondent's medical offices and observed Respondent's practice. The report of the inspection, demonstrates that Respondent may practice medicine in a manner that creates an unreasonable risk that patients may be harmed, including failure to conduct a full examination and evaluation of new patients; and failure to conduct proper eye examinations using an ophthalmoscope.

3.26 At the inspection referenced in paragraph 3.23 above, it was noted that at least one patient file contained billing forms that were pre-signed by a patient prior to the receipt of medical services. Due to this Respondent's prior regulatory history of billing irregularities and the potential for abuse, this practice falls below the standard of care and demonstrates poor judgment.

4.1 The conduct alleged in paragraphs 3.2 through 3.16, 3.21 through and 3.25 above, if proved, constitutes unprofessional conduct pursuant to RCW 18.130.180(4), which defines unprofessional conduct as:

Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed.

4.2 The conduct alleged in paragraphs 3.2 through 3.16, 3.18 through 3.20, and 3.21 through 3.26 constitutes a violation of RCW 18.130.180(9), which defines unprofessional conduct as:

Failure to comply with an order issued by the disciplining authority or an assurance of discontinuance entered into with the disciplining authority.

4.3 It is further alleged that the conduct referred to in this Statement of Charges affects the public health, safety and welfare, and the Commission directs that a notice be issued and served on the Respondent as provided by law, giving Respondent the opportunity to defend against the allegations in this Statement of Charges. If Respondent fails to defend against these allegations, Respondent shall be subject to such discipline as is appropriate under RCW 18.130.160.

DATED this 11th day of October, 1996.

WASHINGTON STATE MEDICAL
QUALITYASSURANCE COMMISSION

By: _____
Beverly A. Teeter
Administrator

Presented by:

_____
Ed Newcomer, WSBA #21612
Assistant Attorney General

NOTICE

PURSUANT TO WASHINGTON ADMINISTRATIVE CODE 246-920-130 IT IS THE RESPONSIBILITY OF THE LICENSEE TO MAINTAIN A CURRENT MAILING ADDRESS ON FILE WITH THE COMMISSION. THE MAILING ADDRESS ON FILE WITH THE COMMISSION SHALL BE USED FOR MAILING OF ALL OFFICIAL MATTERS FROM THE COMMISSION TO THE LICENSEE. IF CHARGES AGAINST THE LICENSEE SENT CERTIFIED MAIL TO THE ADDRESS ON FILE WITH TH ECOMMISSION ARE RETURNED UNCLAIMED OR ARE NOT ABLE TO BE DELIVERED FOR ANY REASON THE COMMISSION IS MANDATED TO PROCEED AGAINST THE LICENSEE BY DEFAULT PURSUANT TO REC 34.05.440.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

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| In the Matter of the license to Practice Medicine of:<br><br>Bang Duy Nguyen, M.D.,<br><br>Respondent. | No. 86-07-0016MD<br>94-12-0034MD<br><br>ANSWER TO AMENDED STATEMENT OF CHARGES AND REQUEST FOR SETTLEMENT AND HEARING |

TO: **BANG DUY NGUYEN, M.D.**
**2811 S. McCLELLAN**
**SEATTLE, WA 98144**

Correct Name: _____
Correct Address: _____
[2817 S Mc]
[Clellan Seattle Wz 98144]
Correct Phone: _____

INSTRUCTIONS: This Form may be used to answer the Amended Statement of Charges and request settlement and hearing. Correct your name, address and phone number above, if necessary, and enter your answers below and sign and date this form. Return it to:

**Department of Health**
**Medical Quality Assurance Commission**
**Legal Unit**
**1300 SE Quince Street**
**Olympia, WA 98504-4786**

THIS FORM MUST BE RECEIVED BY THE COMMISSION WITHIN TWENTY (20) DAYS FROM THE DATE THIS NOTICE WAS MAILED TO YOU. If the twenty-day limit results in a hardship upon you, you may request in writing an extension for good cause not to exceed sixty (60) additional days. A request for extension must be

received within twenty (20) days from the date this notice was mailed to you. The Commission will grant an extension for good cause. Failure to file an answer within the twenty-day time limit or within the time limit established by a hardship extension constitutes a default. Pursuant to RCW 34.05.440 and WAC 246-11-280, a default will result in the loss of your right to an adjudicative proceeding, including a hearing, and resolution of the case without your participation. A default may result in the suspension or revocation of your license.

**Section 1: REQUEST ADJUDICATIVE PROCEEDING**

INSTRUCTIONS: Mark one of the following:

[ ] I waive my opportunity for settlement and hearing. I am enclosing my written statement and/or any materials I wish to have the Commission consider in disposition of this case.

[x] I request an opportunity for settlement and a hearing if settlement is not reached. I understand that a scheduling order will be issued and that I (or my attorney) will be required to participate in all stages of the adjudicative proceeding in accordance with chapter 246-11 WAC.

**Section 2: REPRESENTATION**

INSTRUCTIONS: Mark the appropriate response and provide correct information.

[ ] I will be represented by an attorney who must file a notice of appearance. His/her name, address and phone number are:

Name: [RALPH A. ALFIERI, 211-14th Ave. E]
[Seattle 98112]
[206) 324-7117]

Address: [211-14th Ave. East]
[Seattle, Wa 98112]

Phone: [(206) 324 7117]

[ ] I will not be represented by an attorney.

## Section 3: RESPONSE TO ALLEGATIONS

INSTRUCTIONS: Indicate below wh ther you admit, deny or do not contest each of the alleged facts and alleged violations contained in the numbered paragraphs in the Amended Statement of Charges. Check one response for each numbered paragraph.

| Paragraph Number | Admit | Deny | Do Not Contest |
|---|---|---|---|
| 1.1 | ✔ | | |
| 2.1 | | | ✔ |
| 3.1 | ✔ | | |
| 3.2 | | ✔ | |
| 3.3 | | ✔ | |
| 3.4 | | ✔ | |
| 3.5 | | ✔ | |
| 3.6 | | ✔ | |
| 3.7 | | ✔ | |
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| 3.14 | | ✔ | |
| 3.15 | | ✔ | |
| 3.16 | | ✔ | |
| 3.17 | | ✔ | |

| | | | |
|---|---|---|---|
| 3.18 | | ✔ | |
| 3.19 | | ✔ | |
| 3.20 | | ✔ | |
| 3.21 | | ✔ | |
| 3.22 | | ✔ | |
| 3.23 | | ✔ | |
| 3.24 | | ✔ | |
| 3.25 | | ✔ | |
| 3.26 | | ✔ | |

INSTRUCTIONS: Mark the appropriate response:

[ ] I have attached a sworn statement in my defense or in mitigation of charges.

[x] I have not attached a sworn statement.

**Section 4: INTERPRETER REQUEST**

INSTRUCTIONS: Complete the appropriate information if you request an interpreter because of a primary language other than English and/or because of a hearing or speech impairment. If you later determine that an interpreter will be necessary, you must notify the parties listed in the Notice of Opportunity for Settlement and Hearing. Costs for an interpreter will be paid pursuant to WAC 246.11.200.

[ ] I request that a qualified interpreter be appointed to interpret for me or for my witness(es). My (or my witness(es)') primarily language is _____.

[ ] I request that a qualified interpreter be appointed to interpret for me or for my witness(es). My (or my witness(es)') hearing or speech impairment requires an interpreter to be able to communicate in the following language: _____.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

| | |
|---|---|
| In the Matter of license to Practice Medicine of: | NO. No. 96-07-0067MD |
| BANG D. NGUYEN, M.D., Respondent. | STATEMENT OF CHARGES |

The Administrator of the Washington Medical Quality Assurance Commission upon designation by the Commission, states and alleges as follows:

## Section 1: LICENSE STATUS

1.1 At all times material to this Statement of Charges, Respondent has been licensed to practice medicine and surgery by the state of Washington.

## Section 2: CONFIDENTIAL SCHEDULE

2.1 The patients referred to in this Statement of Charges are identified in the attached Confidential Schedule.

## Section 3: FACTUAL ALLEGATIONS

3.1.1 Respondent entered into a Stipulated and Agreed Final Order dated April 22, 1989. The Agreed Final Order suspended Respondent's license to practice medicine for an indefinite period of time. The suspension was stayed pending satisfactory compliance with certain terms and conditions, including the following:

4.1(A) Respondent shall ensure that all care delivered to patients falls within acceptable standards of medical practice.

4.1(F) Respondent shall keep a log of all surgical procedures he performs, including minor surgery; pelvic examinations and procedures involving invasive instrumentation. A copy of the Log of Procedures, designated as Exhibit 2, is attached to this Stipulation and Agreed Final Order and is incorporated herein.

3.2 On or about May 6, 1995 Respondent performed a physical exam on patient 1, a thirteen year old girl. The exam including sexual contact with the patient, including but not necessarily limited to squeezing the patient's breasts, removing her clothing, and fondling her genitals. The exam was not logged in the Respondent's log book.

3.3 On or about May 12, 1995 Respondent performed a physical exam on patient 1, a thirteen year old girl. The exam including sexual contact with the patient, including not necessarily limited to but squeezing the patient's breasts, removing her clothing, fondling her genitals, and inserting his finger into her vagina. The exam was not logged in the Respondent's log book.

3.4 On or about November 19, 1994, Respondent performed a physical exam on patient 2, an eleven old year old girl. The exam including sexual contact with the patient, including but not necessarily limited to squeezing the patient's breast, removing her clothing, fondling her genitals, and inserting his finger into her vagina. The exam was not logged in the Respondent's log book.

3.5 On or about February 23, 1994, Respondent performed a physical exam on patient 2, a twelve year old girl. The exam including sexual contact with the patient, including but not necessarily limited to squeezing the patient's breast, removing her clothing, fondling her genitals, and inserting his finger into her vagina. The exam was not logged in the Respondent's log book.

3.6 On or about November 9, 1994, Respondent performed a physical exam on patient 3, a 42 year old mother of four children. The exam including sexual contact with the patient, including but not necessarily limited to squeezing the patient's breasts, removing her clothing, fondling her genitals, and inserting his finger into her vagina. Respondent asked the patient sexual questions. The patient attempted to end the pelvic exam, and Respondent held her down forcibly. Respondent asked the patient to sit down on his lap after the pelvic exam. The exam was not logged in the Respondent's log book.

3.7 On or about October 16, 1996, a department investigator visited Respondent's clinic. During this visit, at least one individual employed as a health care worked stated that she acted as a chaperone during examinations of patients, gives injections, draws blood samples, and runs EKGs. This person is not a licensed health care worker, as required by the nature of her duties. There are no other licensed health care workers in Respondent's clinic.

## Section 4: ALLEGED VIOLATIONS

4.1 The conduct alleged in paragraphs 3.2 through 3.6, if proved, constitutes unprofessional conduct pursuant to

RCW 18.130.180(1), -.180_4_, and_.180(24), which define unprofessional conduct as:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action....;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed....;

(24) Abuse of a client or patient or sexual contact with a client or patient.

4.2 The conduct alleged in paragraphs 3.2 through 3.6, specifically failure to log invasive procedures including pelvic exams in the log book, above constitutes a violation of RCW 18.130.180(9), which defines unprofessional conduct as:

Failure to comply with an order issued by the disciplining authority or an assurance of discontinuance entered into with the disciplining authority.

4.3 The conduct alleged in paragraphs 3.7, specifically employment of unlicensed persons to perform duties requiring a licensed person, above constitutes a violation of RCW 18.130.180(10), which defines unprofessional conduct as:

Aiding or abetting an unlicensed person to practice when a licensed is required.

4.4 It is further alleged that the conduct referred to in this Statement of Charges affects the public health, safety and welfare, and the Commission directs that a notice be issued and served on the Respondent as provided by law, giving Respondent the opportunity to defend against the allegations in this Statement of Charges. If Respondent fails to defend against these allegations, Respondent shall be subject to such discipline as is appropriate under RCW 18.130.160

DATED this 16th day of December, 1996

WASHINGTON STATE MEDICAL
QUALITY
ASSURANCE COMMISSION

BY:_____
Beverly A. Teeter
Administrator

Presented by:

_____
Ed Newcomer, WSBA #22168
Assistant Attorney General

NOTICE
PURSUANT TO WASHINGTON ADMINISTRATIVE CODE 246-920-130 IT IS THE RESPONSIBILITY OF THE LICENSEE TO MAINTAIN A CURRENT MAILING ADDRESS ON FILE WITH THE COMMISSION. THE MAILING ADDRESS ON FILE WITH THE COMMISSION SHALL BE USED FOR MAILING OF ALL OFFICIAL MATTERS FROM THE COMMISSION TO THE LICENSEE. IF CHARGES AGAINST THE LICENSEE SENT CERTIFIED MAIL TO THE ADDRESS ON FILE WITH THE COMMISSION ARE RETURNED UNCLAIMED OR ARE NOT ABLE TO BE DELIVERED FOR ANY REASON THE COMMISSION IS MANDATED TO PROCEED AGAINST THE LICENSEE BY DEFAULT PURSUANT TO RCW 34.05.440

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

| | |
|---|---|
| In the Matter of the license to Practice Medicine of:<br><br>Bang Duy Nguyen, M.D.,<br><br>Respondent. | No. 96-07-0067MD<br><br>ANSWER TO STATEMENT OF CHARGES/ ORDER OF SUMMARY SUSPENSION AND REQUEST FOR SETTLEMENT AND HEARING |

TO: **BANG DUY NGUYEN, M.D.**
**2811 S. MCCLELLAN**
**SEATTLE, WA 98144**

Correct Name: _____
Correct Address: _____
_____
_____
Correct Phone: _____

INSTRUCTIONS: This Form may be used to answer the Statement of Charges and request settlement and hearing. Correct your name, address and phone number above, if necessary, and enter your answers below and sign and date this form. Return it to:

**Maryella Jansen, Program Manager**
**Department of Health, HPQAD Section 5**
**1300 SE Quince Street**
**Post Office Box 47866**
**Olympia, Washington 98504-7866**

IF YOU WANT A PROMPT HEARING ON THE ORDER OF SUMMARY SUSPENSION YOUR REQUEST MUST BE FILED WITH THE MEDICAL QUALITY ASSURANCE COMMISSION BY Dec. 26. 1996. FAILURE TO REQUEST A PROMPT HEARING BY THE

DATE SPECIFIED CONSTITUTES A WAIVER OF YOUR RIGHT TO A PROMPT HEARING.

IF YOU DO NOT CHOOSE TO HAVE A PROMPT HEARING, THIS FORM MUST BE RECEIVED BY THE COMMISSION WITHIN TWENTY (20) DAYS FROM THE DATE THIS NOTICE WAS MAILED TO YOU. If the twenty-day limit results in a hardship upon you, you may request in writing an extension for good cause not to exceed sixty (60) additional days. A request for extension must be received within twenty (20) days from the date this notice was mailed to you. The Commission will grant an extension for good cause. Failure to file an answer within the twenty-day time limit or within the time limit established by hardship extension constitutes a default. Pursuant to RCW 34.05.440 and RCW 18.130.090, a default will result in the loss of your right to an adjudicative proceeding, including a hearing, and resolution of the case without your participation. A default may result in the suspension or revocation of your license.

**Section 1: REQUEST ADJUDICATIVE PROCEEDING**

INSTRUCTIONS: Mark one of the following:

[x] I request a prompt hearing on January 6, 1996.

[ ] I waive my opportunity for settlement and hearing. I am enclosing my written statement and/or any materials I wish to have the Commission consider in disposition of this case.

[ ] I request an opportunity for settlement and a hearing if settlement is not reached. I understand that a scheduling order will be issued and that I (or my attorney) will be required to participate in all stages of the adjudicative proceeding in accordance with chapter 246-10 WAC.

## Section 2: REPRESENTATION

INSTRUCTIONS: Mark the appropriate response and provide correct information.

[x] I will be represented by an attorney who must file a notice of appearance. His/her name, address and phone number are:

Name: [RALPH A. ALFIERI]
Address: [211 – 14th AVENUE EAST]
[Seattle, WA 98112-5299]

Phone: [(206) 324-7117]

[ ] I will not be represented by an attorney.

## Section 3: RESPONSE TO ALLEGATIONS

INSTRUCTIONS: Indicate below whether you admit, deny or do not contest each of the alleged facts and alleged violations contained in the numbered paragraphs in the Statement of Charges. Check one response for each numbered paragraph.

| Paragraph Number | Admit | Deny | Do Not Contest |
|---|---|---|---|
| 3.1 | | ✔ | |
| 3.2 | | ✔ | |
| 3.3 | | ✔ | |
| 3.4 | | ✔ | |
| 3.5 | | ✔ | |
| 3.6 | | ✔ | |
| 3.7 | | ✔ | |

INSTRUCTIONS: Mark the appropriate response:

[ ] I have attached a sworn statement in my defense or in mitigation of charges.

[x] I have not attached a sworn statement.

## Section 4: INTERPRETER REQUEST

INSTRUCTIONS: Complete the appropriate information if you request an interpreter because of a primary language other than English and/or because of a hearing or speech impairment. If you later determine that an interpreter will be necessary, you must notify the parties listed in the Notice of Opportunity for Settlement and Hearing. Costs for an interpreter will be paid pursuant to WAC 246.10.121.

[x] I request that a qualified interpreter be appointed to interpret for me or for my witness(es). My (or my witness(es)') primarily language is Southeast Asia Vietnamese.

[ ] I request that a qualified interpreter be appointed to interpret for me or for my witness(es). My (or my witness(es)') hearing or speech impairment requires an interpreter to be able to communicate in the following language: _____.

## Section 5: PROCEDURAL RIGHTS

Pursuant to chapter 34.05 RCW, you have the right to demand a prompt hearing, to be represented by an attorney at your own expense, to subpoena witnesses or the production of books or documents, and to otherwise defend against the allegations in the Statement of Charges. The Commission has adopted procedural rules for the exercise of these rights and

for the conduct of any adjudicative proceeding you request. The rules are contained in chapter 246-10WAC.

Dated this [18th] day of [December], 1996.

[ Nauren Daung ]

Sign here: [/s/ Bang D. Nguyen byRalph A. Alfieri]
Bank D. Nguyen, MD
Respondent

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## WASHINGTON CONSTITUTION

**Article XX**

**Section 2. REGULATIONS CONCERNING MEDICINE, SURGERY AND PHARMACY.** The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

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## WASH. REV. CODE 18.71
## PHYSICIANS

**RCW 18.71.002 Purpose.**

It is the purpose of the medical quality assurance commission to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensing, consistent standards of practice, continuing competency mechanisms, and discipline. Rules, policies, and procedures developed by the commission must promote the delivery of quality health care to the residents of the state of Washington.

**RCW 18.71.003 Declaration of purpose.**

This chapter is passed: (1) In the exercise of the police power of the state to protect public health, to promote the welfare of the state, and to provide an adequate public agency to act as a disciplinary body for the members of the medical profession licensed to practice medicine and surgery in this state; (2) Because the health and well-being of the people of this state are of paramount importance; (3) Because the conduct of members of the medical profession licensed to practice medicine and surgery in this state plays a vital role in preserving the health and well-being of the people of the

state; and (4) Because the agency which now exists to handle disciplinary proceedings for members of the medical profession licensed to practice medicine and surgery in this state is ineffective and very infrequently employed, and consequently there is no effective means of handling such disciplinary proceedings when they are necessary for the protection of the public health.

**RCW 18.71.010 Definitions.**

The following terms used in this chapter shall have the meanings set forth in this section unless the context clearly indicates otherwise: (1) "Commission" means the Washington state medical quality assurance commission. (2) "Secretary" means the secretary of health. (3) "Resident physician" means an individual who has graduated from a school of medicine which meets the requirements set forth in RCW 18.71.055 and is serving a period of postgraduate clinical medical training sponsored by a college or university in this state or by a hospital accredited by this state. For purposes of this chapter, the term shall include individuals designated as intern or medical fellow. (4) "Emergency medical care" or "emergency medical service" has the same meaning as in chapter 18.73 RCW.

**RCW 18.71.011 Definition of practice of medicine—Engaging in practice of chiropractic prohibited, when.**

A person is practicing medicine if he does one or more of the following: (1) Offers or undertakes to diagnose, cure, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality; (2) Administers or prescribes drugs or medicinal preparations to be used by any other person; (3) Severs or penetrates the tissues of human beings; (4) Uses on cards, books, papers, signs or other written or printed means of giving information to the

public, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human disease or conditions the designation "doctor of medicine", "physician", "surgeon", "m.d." or any combination thereof unless such designation additionally contains the description of another branch of the healing arts for which a person has a license: PROVIDED HOWEVER, That a person licensed under this chapter shall not engage in the practice of chiropractic as defined in RCW 18.25.005.

**RCW 18.71.015 Commission established—Membership—Qualifications—Duties and powers—Compensation—Order of removal—Vacancies.**

The Washington state medical quality assurance commission is established, consisting of thirteen individuals licensed to practice medicine in the state of Washington under this chapter, two individuals who are licensed as physician assistants under chapter 18.71A RCW, and four individuals who are members of the public. Each congressional district now existing or hereafter created in the state must be represented by at least one physician member of the commission. The terms of office of members of the commission are not affected by changes in congressional district boundaries. Public members of the commission may not be a member of any other health care licensing board or commission, or have a fiduciary obligation to a facility rendering health services regulated by the commission, or have a material or financial interest in the rendering of health services regulated by the commission. The members of the commission shall be appointed by the governor. Members of the initial commission may be appointed to staggered terms of one to four years, and thereafter all terms of appointment shall be for four years. The governor shall consider such physician and physician assistant members who are recommended for appointment by the appropriate professional associations in the state. In appointing the initial

members of the commission, it is the intent of the legislature that, to the extent possible, the existing members of the board of medical examiners and medical disciplinary board repealed under section 336, chapter 9, Laws of 1994 sp. sess. be appointed to the commission. No member may serve more than two consecutive full terms. Each member shall hold office until a successor is appointed. Each member of the commission must be a citizen of the United States, must be an actual resident of this state, and, if a physician, must have been licensed to practice medicine in this state for at least five years. The commission shall meet as soon as practicable after appointment and elect officers each year. Meetings shall beheld at least four times a year and at such place as the commission determines and at such other times and places as the commission deems necessary. A majority of the commission members appointed and serving constitutes a quorum for the transaction of commission business. The affirmative vote of a majority of a quorum of the commission is required to carry any motion or resolution, to adopt any rule, or to pass any measure. The commission may appoint panels consisting of at least three members. A quorum for the transaction of any business by a panel is a minimum of three members. A majority vote of a quorum of the panel is required to transact business delegated to it by the commission. Each member of the commission shall be compensated in accordance with RCW 43.03.265 and in addition thereto shall be reimbursed for travel expenses incurred in carrying out the duties of the commission in accordance with RCW 43.03.050 and 43.03.060. Any such expenses shall be paid from funds appropriated to the department of health. Whenever the governor is satisfied that a member of a commission has been guilty of neglect of duty, misconduct, or malfeasance or misfeasance in office, the governor shall file with the secretary of state a statement of the causes for and the order of removal from office, and the secretary shall forthwith send a certified copy of the statement of causes and order of removal to the last known

post office address of the member. Vacancies in the membership of the commission shall be filled for the unexpired term by appointment by the governor. The members of the commission are immune from suit in an action, civil or criminal, based on its disciplinary proceedings or other official acts performed in good faith as members of the commission. Whenever the workload of the commission requires, the commission may request that the secretary appoint pro tempore members of the commission. When serving, protempore members of the commission have all of the powers, duties, and immunities, and are entitled to all of the emoluments, including travel expenses, of regularly appointed members of the commission.

**RCW 18.71.017 Rules by commission—Successor to other boards.**

The commission may adopt such rules as are not inconsistent with the laws of this state as may be determined necessary or proper to carry out the purposes of this chapter. The commission is the successor in interest of the board of medical examiners and the medical disciplinary board. All contracts, undertakings, agreements, rules, regulations, and policies continue in full force and effect on July 1, 1994, unless otherwise repealed or rejected by this chapter or by the commission.

**RCW 18.71.019 Application of Uniform Disciplinary Act—Request for review of revocation order.**

The Uniform Disciplinary Act, chapter 18.130 RCW, governs unlicensed practice and the issuance and denial of licenses and discipline of licensees under this chapter. When a panel of the commission revokes a license, the respondent may request review of the revocation order of the panel by the remaining members of the commission not involved in the initial investigation. The respondent's request for review must

be filed within twenty days of the effective date of the order revoking the respondent's license. The review shall be scheduled for hearing by the remaining members of the commission not involved in the initial investigation within sixty days. The commission shall adopt rules establishing review procedures.

**RCW 18.71.0191 Executive director—Staff.**

The secretary of the department of health shall appoint, from a list of three names supplied by the commission, an executive director who shall act to carry out the provisions of this chapter. The secretary shall also employ such additional staff including administrative assistants, investigators, and clerical staff as are required to enable the commission to accomplish its duties and responsibilities. The executive director is exempt from the provisions of the civil service law, chapter 41.06 RCW, as now or hereafter amended.

. . . .

**RCW 18.71.021 License required.**

No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so.

. . . .

**RCW 18.71.050 Application—Eligibility requirements—United States and Canadian graduates.**

(1) Each applicant who has graduated from a school of medicine located in any state, territory, or possession of the United States, the District of Columbia, or the Dominion of Canada, shall file an application for licensure with the commission on a form prepared by the secretary with the

approval of the commission. Each applicant shall furnish proof satisfactory to the commission of the following: (a) That the applicant has attended and graduated from a school of medicine approved by the commission; (b) That the applicant has completed two years of postgraduate medical training in a program acceptable to the commission, provided that applicants graduating before July 28, 1985, may complete only one year of postgraduate medical training; (c) That the applicant is of good moral character; and (d) That the applicant is physically and mentally capable of safely carrying on the practice of medicine. The commission may require any applicant to submit to such examination or examinations as it deems necessary to determine an applicant's physical and/or mental capability to safely practice medicine. (2) Nothing in this section shall be construed as prohibiting the commission from requiring such additional information from applicants as it deems necessary. The issuance and denial of licenses are subject to chapter 18.130 RCW, the Uniform Disciplinary Act.

**RCW 18.71.051 Application—Eligibility requirements—Foreign graduates.**

Applicants for licensure to practice medicine who have graduated from a school of medicine located outside of the states, territories, and possessions of the United States, the District of Columbia, or the Dominion of Canada, shall file an application for licensure with the commission on a form prepared by the secretary with the approval of the commission. Each applicant shall furnish proof satisfactory to the commission of the following: (1) That he or she has completed in a school of medicine a resident course of professional instruction equivalent to that required in this chapter for applicants generally; (2) That he or she meets all the requirements which must be met by graduates of the United States and Canadian school of medicine except that he or she need not have graduated from a school of medicine

approved by the commission; (3) That he or she has satisfactorily passed the examination given by the educational council for foreign medical graduates or has met the requirements in lieu thereof as set forth in rules adopted by the commission; (4) That he or she has the ability to read, write, speak, understand, and be understood in the English language.

**RCW 18.71.055 Schools of medicine—Requirements for approval.**

The commission may approve any school of medicine which is located in any state, territory, or possession of the United States, the District of Columbia, or in the Dominion of Canada, provided that it: (1) Requires collegiate instruction which includes courses deemed by the commission to be prerequisites to medical education; (2) Provides adequate instruction in the following subjects: Anatomy, biochemistry, microbiology and immunology, pathology, pharmacology, physiology, anaesthesiology, dermatology, gynecology, internal medicine, neurology, obstetrics, ophthalmology, orthopedic surgery, otolaryngology, pediatrics, physical medicine and rehabilitation, preventive medicine and public health, psychiatry, radiology, surgery, and urology, and such other subjects determined by the commission; (3) Provides clinical instruction in hospital wards and out-patient clinics under guidance. Approval may be withdrawn by the commission at any time a medical school ceases to comply with one or more of the requirements of this section. (4) Nothing in this section shall be construed to authorize the commission to approve a school of osteopathic medicine and surgery, or osteopathic medicine, for purposes of qualifying an applicant to be licensed under this chapter by direct licensure, reciprocity, or otherwise.

**RCW 18.71.060 Record of proceedings of commission and of applications.**

The commission shall keep an official record of all its proceedings, a part of which record shall consist of a register of all applicants for licensure under this chapter, with the result of each application. The record shall be evidence of all the proceedings of the commission that are set forth in it.

**RCW 18.71.070 Examination—Record.**

With the exception of those applicants granted licensure through the provisions of RCW 18.71.090 or 18.71.095, applicants for licensure must successfully complete an examination administered by the commission to determine their professional qualifications. The commission shall prepare and give, or approve the preparation and giving of, an examination which shall cover those general subjects and topics, a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine conferred by approved colleges or schools of medicine in the United States. Notwithstanding any other provision of law, the commission has the sole responsibility for determining the proficiency of applicants under this chapter, and, in so doing, may waive any prerequisite to licensure not set forth in this chapter. The commission may by rule establish the passing grade for the examination. Examination results shall be part of the records of the commission and shall be permanently kept with the applicant's file.

**RCW 18.71.080 License renewal—Continuing education requirement—Failure to renew, procedure.**

Every person licensed to practice medicine in this state shall pay licensing fees and renew his or her license in accordance with administrative procedures and administrative requirements adopted as provided in RCW 43.70.250 and

43.70.280 The commission may establish rules governing mandatory continuing education requirements which shall be met by physicians applying for renewal of licenses. The rules shall provide that mandatory continuing education requirements may be met in part by physicians showing evidence of the completion of approved activities relating to professional liability risk management. The commission, in its sole discretion, may permit an applicant who has not renewed his or her license to be licensed without examination if it is satisfied that such applicant meets all the requirements for licensure in this state, and is competent to engage in the practice of medicine.

. . . .

**RCW 18.71.090 License without examination—Reciprocity—National board examinees—Fee.**

Any applicant who meets the requirements of RCW 18.71.050 and has been licensed under the laws of another state, territory, or possession of the United States, or of any province of Canada, or an applicant who has satisfactorily passed examinations given by the national board of medical examiners may, in the discretion of the commission, be granted a license without examination on the payment of the fees required by this chapter: PROVIDED, That the applicant must file with the commission a copy of the license certified by the proper authorities of the issuing state to be a full, true copy thereof, and must show that the standards, eligibility requirements, and examinations of that state are at least equal in all respects to those of this state.

. . . .

**RCW 18.71.190 False personation—Penalty.**

Every person filing for record, or attempting to file for record, the certificate issued to another, falsely claiming himself to be the person named in such certificate, or falsely claiming himself to be the person entitled to the same, shall be guilty of a felony, and, upon conviction thereof, shall be subject to such penalties as are provided by the laws of this state for the crime of forgery.

. . . .

**RCW 18.71.300 Impaired physician program—Definitions.**

The definitions in this section apply throughout RCW 18.71.310 through 18.71.340 unless the context clearly requires otherwise. (1) "Entity" means a nonprofit corporation formed by physicians who have expertise in the areas of alcohol abuse, drug abuse, alcoholism, other drug addictions, and mental illness and who broadly represent the physicians of the state and that has been designated to perform any or all of the activities set forth in RCW 18.71.310(1) by the commission. (2) "Impaired" or "impairment" means the inability to practice medicine with reasonable skill and safety to patients by reason of physical or mental illness including alcohol abuse, drug abuse, alcoholism, other drug addictions, or other debilitating conditions. (3) "Impaired physician program" means the program for the prevention, detection, intervention, monitoring, and treatment of impaired physicians established by the commission pursuant to RCW 18.71.310(1). (4) "Physician" or "practitioner" means a person licensed under this chapter, chapter 18.71A RCW, or a professional licensed under another chapter of Title 18 RCW whose disciplining authority has a contract with the entity for an impaired practitioner program for its license holders. (5) "Treatment

program" means a plan of care and rehabilitation services provided by those organizations or persons authorized to provide such services to be approved by the commission or entity for impaired physicians taking part in the impaired physician program created by RCW 18.71.310.

. . . .

**RCW 18.71.330 Impaired physician program—Evaluation of physician.**

If the commission has reasonable cause to believe that a physician is impaired, the commission shall cause an evaluation of such physician to be conducted by the entity or the entity's designee or the commission's designee for the purpose of determining if there is an impairment. The entity or appropriate designee shall report the findings of its evaluation to the commission.

. . . .

**RCW 18.71.350 Report of malpractice payments by insurers.**

(1) Every institution or organization providing professional liability insurance to physicians shall send a complete report to the commission of all malpractice settlements, awards, or payments in excess of twenty thousand dollars as a result of a claim or action for damages alleged to have been caused by an insured physician's incompetency or negligence in the practice of medicine. Such institution or organization shall also report the award, settlement, or payment of three or more claims during a five-year time period as the result of the alleged physician's incompetence or negligence in the practice of medicine regardless of the dollar amount of the award or payment. (2) Reports required by this section shall be made within sixty days of the date of the settlement or

verdict. Failure to comply with this section is punishable by a civil penalty not to exceed two hundred fifty dollars.

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## WASH. REV. CODE 18.130
## REGULATION OF HEALTH PROFESSIONS— UNIFORM DISCIPLINARY ACT

### RCW 18.130.010. Intent.

It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts.

It is also the intent of the legislature that all health and health-related professions newly credentialed by the state come under the Uniform Disciplinary Act.

Further, the legislature declares that the addition of public members on all health care commissions and boards can give both the state and the public, which it has a statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care.

### RCW 18.130.020. Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Disciplining authority" means the agency, board, or commission having the authority to take disciplinary action against a holder of, or applicant for, a professional or business license upon a finding of a violation of this chapter or a chapter specified under RCW 18.130.040.

(2) "Department" means the department of health.

(3) "Secretary" means the secretary of health or the secretary's designee.

(4) "Board" means any of those boards specified in RCW 18.130.040.

(5) "Commission" means any of the commissions specified in RCW 18.130.040.

(6) "Unlicensed practice" means:

(a) Practicing a profession or operating a business identified in RCW 18.130.040 without holding a valid, unexpired, unrevoked, and unsuspended license to do so; or

(b) Representing to a consumer, through offerings, advertisements, or use of a professional title or designation, that the individual is qualified to practice a profession or operate a business identified in RCW 18.130.040, without holding a valid, unexpired, unrevoked, and unsuspended license to do so.

(7) "Disciplinary action" means sanctions identified in RCW 18.130.160.

(8) "Practice review" means an investigative audit of records related to the complaint, without prior identification of specific patient or consumer names, or an assessment of the conditions, circumstances, and methods of the professional's

practice related to the complaint, to determine whether unprofessional conduct may have been committed.

(9) "Health agency" means city and county health departments and the department of health.

(10) "License," "licensing," and "licensure" shall be deemed equivalent to the terms "license," "licensing," "licensure," "certificate," "certification," and "registration" as those terms are defined in RCW 18.120.020.

**RCW 18.130.040. Application to certain professions—Authority of secretary—Grant or denial of licenses—Procedural rules.**

(1) This chapter applies only to the secretary and the boards and commissions having jurisdiction in relation to the professions licensed under the chapters specified in this section. This chapter does not apply to any business or profession not licensed under the chapters specified in this section.

(2)(a) The secretary has authority under this chapter in relation to the following professions:

. . . .

(b) The boards and commissions having authority under this chapter are as follows:

. . . .

(ix) The medical quality assurance commission as established in chapter 18.71 RCW governing licenses and registrations issued under chapters 18.71 and 18.71A RCW;

. . . .

(3) In addition to the authority to discipline license holders, the disciplining authority has the authority to grant or deny licenses based on the conditions and criteria established in this chapter and the chapters specified in subsection (2) of this section. This chapter also governs any investigation, hearing, or proceeding relating to denial of licensure or issuance of a license conditioned on the applicant's compliance with an order entered pursuant to RCW 18.130.160 by the disciplining authority.

(4) All disciplining authorities shall adopt procedures to ensure substantially consistent application of this chapter, the Uniform Disciplinary Act, among the disciplining authorities listed in subsection (2) of this
section.

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**RCW 18.130.050. Authority of disciplining authority.**

The disciplining authority has the following authority:

(1) To adopt, amend, and rescind such rules as are deemed necessary to carry out this chapter;

(2) To investigate all complaints or reports of unprofessional conduct as defined in this chapter and to hold hearings as provided in this chapter;

(3) To issue subpoenas and administer oaths in connection with any investigation, hearing, or proceeding held under this chapter;

(4) To take or cause depositions to be taken and use other discovery procedures as needed in any investigation, hearing, or proceeding held under this chapter;

(5) To compel attendance of witnesses at hearings;

(6) In the course of investigating a complaint or report of unprofessional conduct, to conduct practice reviews;

(7) To take emergency action ordering summary suspension of a license, or restriction or limitation of the licensee's practice pending proceedings by the disciplining authority;

(8) To use a presiding officer as authorized in RCW 18.130.095(3) or the office of administrative hearings as authorized in chapter 34.12 RCW to conduct hearings. The disciplining authority shall make the final decision regarding disposition of the license unless the disciplining authority elects to delegate in writing the final decision to the presiding officer;

(9) To use individual members of the boards to direct investigations. However, the member of the board shall not subsequently participate in the hearing of the case;

(10) To enter into contracts for professional services determined to be necessary for adequate enforcement of this chapter;

(11) To contract with licensees or other persons or organizations to provide services necessary for the monitoring and supervision of licensees who are placed on probation, whose professional activities are restricted, or who are for any authorized purpose subject to monitoring by the disciplining authority;

(12) To adopt standards of professional conduct or practice;

(13) To grant or deny license applications, and in the event of a finding of unprofessional conduct by an applicant or license

holder, to impose any sanction against a license applicant or license holder provided by this chapter;

(14) To designate individuals authorized to sign subpoenas and statements of charges;

(15) To establish panels consisting of three or more members of the board to perform any duty or authority within the board's jurisdiction under this chapter;

(16) To review and audit the records of licensed health facilities' or services' quality assurance committee decisions in which a licensee's practice privilege or employment is terminated or restricted. Each health facility or service shall produce and make accessible to the disciplining authority the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to discovery or introduction into evidence in any civil action pursuant to RCW 70.41.200(3).

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**RCW 18.130.080. Unprofessional conduct—Complaint—Investigation—Immunity of complainant.**

A person, including but not limited to consumers, licensees, corporations, organizations, health care facilities, impaired practitioner programs, or voluntary substance abuse monitoring programs approved by disciplining authorities, and state and local governmental agencies, may submit a written complaint to the disciplining authority charging a license holder or applicant with unprofessional conduct and specifying the grounds therefor or to report information to the disciplining authority, or voluntary substance abuse monitoring program, or an impaired practitioner program approved by the disciplining authority, which indicates that the license holder may not be able to practice his or her

profession with reasonable skill and safety to consumers as a result of a mental or physical condition. If the disciplining authority determines that the complaint merits investigation, or if the disciplining authority has reason to believe, without a formal complaint, that a license holder or applicant may have engaged in unprofessional conduct, the disciplining authority shall investigate to determine whether there has been unprofessional conduct. A person who files a complaint or reports information under this section in good faith is immune from suit in any civil action related to the filing or contents of the complaint.

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**RCW 18.130.090. Statement of charge—Request for hearing.**

(1) If the disciplining authority determines, upon investigation, that there is reason to believe a violation of RCW 18.130.180 has occurred, a statement of charge or charges shall be prepared and served upon the license holder or applicant at the earliest practical time. The statement of charge or charges shall be accompanied by a notice that the license holder or applicant may request a hearing to contest the charge or charges. The license holder or applicant must file a request for hearing with the disciplining authority within twenty days after being served the statement of charges. If the twenty- day limit results in a hardship upon the license holder or applicant, he or she may request for good cause an extension not to exceed sixty additional days. If the disciplining authority finds that there is good cause, it shall grant the extension. The failure to request a hearing constitutes a default, whereupon the disciplining authority may enter a decision on the basis of the facts available to it.

(2) If a hearing is requested, the time of the hearing shall be fixed by the disciplining authority as soon as convenient, but

the hearing shall not be held earlier than thirty days after service of the charges upon the license holder or applicant.

**RCW 18.130.095. Uniform procedural rules.**

(1)(a) The secretary, in consultation with the disciplining authorities, shall develop uniform procedural rules to respond to public inquiries concerning complaints and their disposition, active investigations, statement of charges, findings of fact, and final orders involving a licensee, applicant, or unlicensed person. The uniform procedural rules adopted under this subsection apply to all adjudicative proceedings conducted under this chapter and shall include provisions for establishing time periods for initial assessment, investigation, charging, discovery, settlement, and adjudication of complaints, and shall include enforcement provisions for violations of the specific time periods by the department, the disciplining authority, and the respondent. A licensee must be notified upon receipt of a complaint, except when the notification would impede an effective investigation. At the earliest point of time the licensee must be allowed to submit a written statement about that complaint, which statement must be included in the file. Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.17 RCW until the complaint has been initially assessed and determined to warrant an investigation by the disciplining authority. Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department. Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection. Complaints determined to warrant no cause for action after investigation are subject to public disclosure, must include an explanation of the determination

to close the complaint, and must remain in the records and tracking system of the department.

(b) The secretary, on behalf of the disciplining authorities, shall enter into interagency agreements for the exchange of records, which may include complaints filed but not yet assessed, with other state agencies if access to the records will assist those agencies in meeting their federal or state statutory responsibilities. Records obtained by state agencies under the interagency agreements are subject to the limitations on disclosure contained in (a) of this subsection.

(2) The uniform procedures for conducting investigations shall provide that prior to taking a written statement:

(a) For violation of this chapter, the investigator shall inform such person, in writing of: (i) The nature of the complaint; (ii) that the person may consult with legal counsel at his or her expense prior to making a statement; and (iii) that any statement that the person makes may be used in an adjudicative proceeding conducted under this chapter; and

(b) From a witness or potential witness in an investigation under this chapter, the investigator shall inform the person, in writing, that the statement may be released to the licensee, applicant, or unlicensed person under investigation if a statement of charges is issued.

(3) Only upon the authorization of a disciplining authority identified in RCW 18.130.040(2)(b), the secretary, or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplining authority authorized under this chapter. Except as provided in RCW 18.130.050(8), the presiding officer shall not vote on or make any final decision. All functions performed by the presiding officer shall be subject to chapter 34.05 RCW. The

secretary, in consultation with the disciplining authorities, shall adopt procedures for implementing this subsection.

(4) The uniform procedural rules shall be adopted by all disciplining authorities listed in RCW 18.130.040(2), and shall be used for all adjudicative proceedings conducted under this chapter, as defined by chapter 34.05 RCW. The uniform procedural rules shall address the use of a presiding officer authorized in subsection (3) of this section to determine and issue decisions on all legal issues and motions arising during adjudicative proceedings.

**RCW 18.130.098. Settlement—Disclosure—Conference.**

(1) The settlement process must be substantially uniform for licensees governed by disciplining authorities under this chapter. The disciplinary authorities may also use alternative dispute resolution to resolve complaints during adjudicative proceedings.

(2) Disclosure of the identity of reviewing disciplining authority members who participate in the settlement process is available to the respondent or his or her representative upon request.

(3) The settlement conference will occur only if a settlement is not achieved through written documents. The respondent will have the opportunity to conference either by phone or in person with the reviewing disciplining authority member if the respondent chooses. The respondent may also have his or her attorney conference either by phone or in person with the reviewing disciplining authority member without the respondent being present personally.

(4) If the respondent wants to meet in person with the reviewing disciplining authority member, he or she will travel to the reviewing disciplining authority member and have such

a conference with a department representative in attendance either by phone or in person.

**RCW 18.130.100. Hearings—Adjudicative proceedings under chapter 34.05 RCW.**

The procedures governing adjudicative proceedings before agencies under chapter 34.05 RCW, the Administrative Procedure Act, govern all hearings before the disciplining authority. The disciplining authority has, in addition to the powers and duties set forth in this chapter, all of the powers and duties under chapter 34.05 RCW, which include, without limitation, all powers relating to the administration of oaths, the receipt of evidence, the issuance and enforcing of subpoenas, and the taking of depositions.

**RCW 18.130.110. Findings of fact—Order—Report.**

(1) In the event of a finding of unprofessional conduct, the disciplining authority shall prepare and serve findings of fact and an order as provided in chapter 34.05 RCW, the Administrative Procedure Act. If the license holder or applicant is found to have not committed unprofessional conduct, the disciplining authority shall forthwith prepare and serve findings of fact and an order of dismissal of the charges, including public exoneration of the licensee or applicant. The findings of fact and order shall be retained by the disciplining authority as a permanent record.

(2) The disciplining authority shall report the issuance of statements of charges and final orders in cases processed by the disciplining authority to:

(a) The person or agency who brought to the disciplining authority's attention information which resulted in the initiation of the case;

(b) Appropriate organizations, public or private, which serve the professions;

(c) The public. Notification of the public shall include press releases to appropriate local news media and the major news wire services; and

(d) Counterpart licensing boards in other states, or associations of state licensing boards.

(3) This section shall not be construed to require the reporting of any information which is exempt from public disclosure under chapter 42.17 RCW.

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**RCW 18.130.140. Appeal.**

An individual who has been disciplined or whose license has been denied by a disciplining authority may appeal the decision as provided in chapter 34.05 RCW.

**RCW 18.130.150. Reinstatement.**

A person whose license has been suspended or revoked under this chapter may petition the disciplining authority for reinstatement after an interval as determined by the disciplining authority in the order. The disciplining authority shall hold hearings on the petition and may deny the petition or may order reinstatement and impose terms and conditions as provided in RCW 18.130.160 and issue an order of reinstatement. The disciplining authority may require successful completion of an examination as a condition of reinstatement.

A person whose license has been suspended for noncompliance with a support order or a *residential or

visitation order under RCW 74.20A.320 may petition for reinstatement at any time by providing the secretary a release issued by the department of social and health services stating that the person is in compliance with the order. If the person has continued to meet all other requirements for reinstatement during the suspension, the secretary shall automatically reissue the person's license upon receipt of the release, and payment of a reinstatement fee, if any.

**RCW 18.130.160. Finding of unprofessional conduct—Orders—Sanctions—Stay— Costs—Stipulations.**

Upon a finding, after hearing, that a license holder or applicant has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority may issue an order providing for one or any combination of the following:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation. Funds received shall be placed in the health professions account;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fees billed to and collected from the consumer.

Any of the actions under this section may be totally or partly stayed by the disciplining authority. In determining what action is appropriate, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder or applicant. All costs associated with compliance with orders issued under this section are the obligation of the license holder or applicant.

The licensee or applicant may enter into a stipulated disposition of charges that includes one or more of the sanctions of this section, but only after a statement of charges has been issued and the licensee has been afforded the opportunity for a hearing and has elected on the record to forego such a hearing. The stipulation shall either contain one or more specific findings of unprofessional conduct or inability to practice, or a statement by the licensee acknowledging that evidence is sufficient to justify one or more specified findings of unprofessional conduct or inability to practice. The stipulation entered into pursuant to this subsection shall be considered formal disciplinary action for all purposes.

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**RCW 18.130.170. Capacity of license holder to practice—Hearing—Mental or physical examination—Implied consent.**

(1) If the disciplining authority believes a license holder or applicant may be unable to practice with reasonable skill and safety to consumers by reason of any mental or physical condition, a statement of charges in the name of the disciplining authority shall be served on the license holder or applicant and notice shall also be issued providing an opportunity for a hearing. The hearing shall be limited to the sole issue of the capacity of the license holder or applicant to practice with reasonable skill and safety. If the disciplining authority determines that the license holder or applicant is unable to practice with reasonable skill and safety for one of the reasons stated in this subsection, the disciplining authority shall impose such sanctions under RCW 18.130.160 as is deemed necessary to protect the public.

(2)(a) In investigating or adjudicating a complaint or report that a license holder or applicant may be unable to practice with reasonable skill or safety by reason of any mental or physical condition, the disciplining authority may require a license holder or applicant to submit to a mental or physical examination by one or more licensed or certified health professionals designated by the disciplining authority. The license holder or applicant shall be provided written notice of the disciplining authority's intent to order a mental or physical examination, which notice shall include: (i) A statement of the specific conduct, event, or circumstances justifying an examination; (ii) a summary of the evidence supporting the disciplining authority's concern that the license holder or applicant may be unable to practice with reasonable skill and safety by reason of a mental or physical condition, and the grounds for believing such evidence to be credible and reliable; (iii) a statement of the nature, purpose,

scope, and content of the intended examination; (iv) a statement that the license holder or applicant has the right to respond in writing within twenty days to challenge the disciplining authority's grounds for ordering an examination or to challenge the manner or form of the examination; and (v) a statement that if the license holder or applicant timely responds to the notice of intent, then the license holder or applicant will not be required to submit to the examination while the response is under consideration.

(b) Upon submission of a timely response to the notice of intent to order a mental or physical examination, the license holder or applicant shall have an opportunity to respond to or refute such an order by submission of evidence or written argument or both. The evidence and written argument supporting and opposing the mental or physical examination shall be reviewed by either a panel of the disciplining authority members who have not been involved with the allegations against the license holder or applicant or a neutral decision maker approved by the disciplining authority. The reviewing panel of the disciplining authority or the approved neutral decision maker may, in its discretion, ask for oral argument from the parties. The reviewing panel of the disciplining authority or the approved neutral decision maker shall prepare a written decision as to whether: There is reasonable cause to believe that the license holder or applicant may be unable to practice with reasonable skill and safety by reason of a mental or physical condition, or the manner or form of the mental or physical examination is appropriate, or both.

(c) Upon receipt by the disciplining authority of the written decision, or upon the failure of the license holder or applicant to timely respond to the notice of intent, the disciplining authority may issue an order requiring the license holder or applicant to undergo a mental or physical examination. All such mental or physical examinations shall be narrowly

tailored to address only the alleged mental or physical condition and the ability of the license holder or applicant to practice with reasonable skill and safety. An order of the disciplining authority requiring the license holder or applicant to undergo a mental or physical examination is not a final order for purposes of appeal. The cost of the examinations ordered by the disciplining authority shall be paid out of the health professions account. In addition to any examinations ordered by the disciplining authority, the licensee may submit physical or mental examination reports from licensed or certified health professionals of the license holder's or applicant's choosing and expense.

(d) If the disciplining authority finds that a license holder or applicant has failed to submit to a properly ordered mental or physical examination, then the disciplining authority may order appropriate action or discipline under RCW 18.130.180(9), unless the failure was due to circumstances beyond the person's control. However, no such action or discipline may be imposed unless the license holder or applicant has had the notice and opportunity to challenge the disciplining authority's grounds for ordering the examination, to challenge the manner and form, to assert any other defenses, and to have such challenges or defenses considered by either a panel of the disciplining authority members who have not been involved with the allegations against the license holder or applicant or a neutral decision maker approved by the disciplining authority, as previously set forth in this section. Further, the action or discipline ordered by the disciplining authority shall not be more severe than a suspension of the license, certification, registration or application until such time as the license holder or applicant complies with the properly ordered mental or physical examination.

(e) Nothing in this section shall restrict the power of a disciplining authority to act in an emergency under RCW 34.05.422(4), 34.05.479, and RCW 18.130.050(7).

(f) A determination by a court of competent jurisdiction that a license holder or applicant is mentally incompetent or mentally ill is presumptive evidence of the license holder's or applicant's inability to practice with reasonable skill and safety. An individual affected under this section shall at reasonable intervals be afforded an opportunity, at his or her expense, to demonstrate that the individual can resume competent practice with reasonable skill and safety to the consumer.

(3) For the purpose of subsection (2) of this section, an applicant or license holder governed by this chapter, by making application, practicing, or filing a license renewal, is deemed to have given consent to submit to a mental, physical, or psychological examination when directed in writing by the disciplining authority and further to have waived all objections to the admissibility or use of the examining health professional's testimony or examination reports by the disciplining authority on the ground that the testimony or reports constitute privileged communications.

**RCW 18.130.172. Evidence summary and stipulations.**

(1) Prior to serving a statement of charges under RCW 18.130.090 or RCW 18.130.170, the disciplinary authority may furnish a statement of allegations to the licensee or applicant along with a detailed summary of the evidence relied upon to establish the allegations and a proposed stipulation for informal resolution of the allegations. These documents shall be exempt from public disclosure until such time as the allegations are resolved either by stipulation or otherwise.

(2) The disciplinary authority and the applicant or licensee may stipulate that the allegations may be disposed of informally in accordance with this subsection. The stipulation shall contain a statement of the facts leading to the filing of the complaint; the act or acts of unprofessional conduct alleged to have been committed or the alleged basis for determining that the applicant or licensee is unable to practice with reasonable skill and safety; a statement that the stipulation is not to be construed as a finding of either unprofessional conduct or inability to practice; an acknowledgement that a finding of unprofessional conduct or inability to practice, if proven, constitutes grounds for discipline under this chapter; and an agreement on the part of the licensee or applicant that the sanctions set forth in RCW 18.130.160, except RCW 18.130.160 (1), (2), (6), and (8), may be imposed as part of the stipulation, except that no fine may be imposed but the licensee or applicant may agree to reimburse the disciplinary authority the costs of investigation and processing the complaint up to an amount not exceeding one thousand dollars per allegation; and an agreement on the part of the disciplinary authority to forego further disciplinary proceedings concerning the allegations. A stipulation entered into pursuant to this subsection shall not be considered formal disciplinary action.

(3) If the licensee or applicant declines to agree to disposition of the charges by means of a stipulation pursuant to subsection (2) of this section, the disciplinary authority may proceed to formal disciplinary action pursuant to RCW 18.130.090 or RCW 18.130.170.

(4) Upon execution of a stipulation under subsection (2) of this section by both the licensee or applicant and the disciplinary authority, the complaint is deemed disposed of and shall become subject to public disclosure on the same basis and to the same extent as other records of the disciplinary authority. Should the licensee or applicant fail to

pay any agreed reimbursement within thirty days of the date specified in the stipulation for payment, the disciplinary authority may seek collection of the amount agreed to be paid in the same manner as enforcement of a fine under RCW 18.130.165.

**RCW 18.130.175. Voluntary substance abuse monitoring programs.**

(1) In lieu of disciplinary action under RCW 18.130.160 and if the disciplining authority determines that the unprofessional conduct may be the result of substance abuse, the disciplining authority may refer the license holder to a voluntary substance abuse monitoring program approved by the disciplining authority.

The cost of the treatment shall be the responsibility of the license holder, but the responsibility does not preclude payment by an employer, existing insurance coverage, or other sources. Primary alcoholism or other drug addiction treatment shall be provided by approved treatment programs under RCW 70.96A.020 or by any other provider approved by the entity or the commission. However, nothing shall prohibit the disciplining authority from approving additional services and programs as an adjunct to primary alcoholism or other drug addiction treatment. The disciplining authority may also approve the use of out-of-state programs. Referral of the license holder to the program shall be done only with the consent of the license holder. Referral to the program may also include probationary conditions for a designated period of time. If the license holder does not consent to be referred to the program or does not successfully complete the program, the disciplining authority may take appropriate action under RCW 18.130.160. The secretary shall adopt uniform rules for the evaluation by the disciplinary authority of a relapse or program violation on the part of a license holder in the substance abuse monitoring program. The

evaluation shall encourage program participation with additional conditions, in lieu of disciplinary action, when the disciplinary authority determines that the license holder is able to continue to practice with reasonable skill and safety.

(2) In addition to approving substance abuse monitoring programs that may receive referrals from the disciplining authority, the disciplining authority may establish by rule requirements for participation of license holders who are not being investigated or monitored by the disciplining authority for substance abuse. License holders voluntarily participating in the approved programs without being referred by the disciplining authority shall not be subject to disciplinary action under RCW 18.130.160 for their substance abuse, and shall not have their participation made known to the disciplining authority, if they meet the requirements of this section and the program in which they are participating.

(3) The license holder shall sign a waiver allowing the program to release information to the disciplining authority if the licensee does not comply with the requirements of this section or is unable to practice with reasonable skill or safety. The substance abuse program shall report to the disciplining authority any license holder who fails to comply with the requirements of this section or the program or who, in the opinion of the program, is unable to practice with reasonable skill or safety. License holders shall report to the disciplining authority if they fail to comply with this section or do not complete the program's requirements. License holders may, upon the agreement of the program and disciplining authority, reenter the program if they have previously failed to comply with this section.

(4) The treatment and pretreatment records of license holders referred to or voluntarily participating in approved programs shall be confidential, shall be exempt from RCW 42.17.250 through 42.17.450, and shall not be subject to discovery by

subpoena or admissible as evidence except for monitoring records reported to the disciplining authority for cause as defined in subsection (3) of this section. Monitoring records relating to license holders referred to the program by the disciplining authority or relating to license holders reported to the disciplining authority by the program for cause, shall be released to the disciplining authority at the request of the disciplining authority. Records held by the disciplining authority under this section shall be exempt from RCW 42.17.250 through 42.17.450 and shall not be subject to discovery by subpoena except by the license holder.

(5) "Substance abuse," as used in this section, means the impairment, as determined by the disciplining authority, of a license holder's professional services by an addiction to, a dependency on, or the use of alcohol, legend drugs, or controlled substances.

(6) This section does not affect an employer's right or ability to make employment-related decisions regarding a license holder. This section does not restrict the authority of the disciplining authority to take disciplinary action for any other unprofessional conduct.

(7) A person who, in good faith, reports information or takes action in connection with this section is immune from civil liability for reporting information or taking the action.

(a) The immunity from civil liability provided by this section shall be liberally construed to accomplish the purposes of this section and the persons entitled to immunity shall include:

(i) An approved monitoring treatment program;

(ii) The professional association operating the program;

(iii) Members, employees, or agents of the program or association;

(iv) Persons reporting a license holder as being possibly impaired or providing information about the license holder's impairment; and

(v) Professionals supervising or monitoring the course of the impaired license holder's treatment or rehabilitation.

(b) The courts are strongly encouraged to impose sanctions on clients and their attorneys whose allegations under this subsection are not made in good faith and are without either reasonable objective, substantive grounds, or both.

(c) The immunity provided in this section is in addition to any other immunity provided by law.

**RCW 18.130.180 Unprofessional conduct.**

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been

deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers or documents;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing reasonable and timely access for authorized representatives of the disciplining authority seeking to perform practice reviews at facilities utilized by the license holder;

(9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;

(10) Aiding or abetting an unlicensed person to practice when a license is required;

(11) Violations of rules established by any health agency;

(12) Practice beyond the scope of practice as defined by law or rule;

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

(14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;

(15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;

(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chpater 9.96A RCW;

(18) The procuring, or aiding or abetting in procuring, a criminal abortion;

(19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;

(20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW;

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding;

(23) Current misuse of:

(a) Alcohol;

(b) Controlled substances; or

(c) Legend drugs;

(24) Abuse of a client or patient or sexual contact with a client or patient;

(25) Acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor of medical or health-related products or services intended for patients, in contemplation of a sale or for use in research publishable in professional journals, where a conflict of interest is presented, as defined by rules of the disciplining authority, in consultation with the department, based on recognized professional ethical standards.

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**RCW 18.130.186. Voluntary substance abuse monitoring program—Content—License surcharge.**

(1) To implement a substance abuse monitoring program for license holders specified under RCW 18.130.040, who are impaired by substance abuse, the disciplinary authority may enter into a contract with a voluntary substance abuse program under RCW 18.130.175. The program may include any or all of the following:

(a) Contracting with providers of treatment programs;

(b) Receiving and evaluating reports of suspected impairment from any source;

(c) Intervening in cases of verified impairment;

(d) Referring impaired license holders to treatment programs;

(e) Monitoring the treatment and rehabilitation of impaired license holders including those ordered by the disciplinary authority;

(f) Providing education, prevention of impairment, posttreatment monitoring, and support of rehabilitated impaired license holders; and

(g) Performing other activities as agreed upon by the disciplinary authority.

(2) A contract entered into under subsection (1) of this section may be financed by a surcharge on each license issuance or renewal to be collected by the department of health from the license holders of the same regulated health profession. These moneys shall be placed in the health professions account to be used solely for the implementation of the program.

**RCW 18.130.190. Practice without license—Investigation of complaints—Cease and desist orders—Injunctions—Penalties.**

(1) The secretary shall investigate complaints concerning practice by unlicensed persons of a profession or business for which a license is required by the chapters specified in RCW 18.130.040. In the investigation of the complaints, the secretary shall have the same authority as provided the secretary under RCW 18.130.050.

(2) The secretary may issue a notice of intention to issue a cease and desist order to any person whom the secretary has reason to believe is engaged in the unlicensed practice of a profession or business for which a license is required by the chapters specified in RCW 18.130.040. The person to whom such notice is issued may request an adjudicative proceeding to contest the charges. The request for hearing must be filed

within twenty days after service of the notice of intention to issue a cease and desist order. The failure to request a hearing constitutes a default, whereupon the secretary may enter a permanent cease and desist order, which may include a civil fine. All proceedings shall be conducted in accordance with chapter 34.05 RCW.

(3) If the secretary makes a final determination that a person has engaged or is engaging in unlicensed practice, the secretary may issue a cease and desist order. In addition, the secretary may impose a civil fine in an amount not exceeding one thousand dollars for each day upon which the person engaged in unlicensed practice of a business or profession for which a license is required by one or more of the chapters specified in RCW 18.130.040. The proceeds of such fines shall be deposited to the health professions account.

(4) If the secretary makes a written finding of fact that the public interest will be irreparably harmed by delay in issuing an order, the secretary may issue a temporary cease and desist order. The person receiving a temporary cease and desist order shall be provided an opportunity for a prompt hearing. The temporary cease and desist order shall remain in effect until further order of the secretary. The failure to request a prompt or regularly scheduled hearing constitutes a default, whereupon the secretary may enter a permanent cease and desist order, which may include a civil fine.

(5) Neither the issuance of a cease and desist order nor payment of a civil fine shall relieve the person so practicing or operating a business without a license from criminal prosecution therefor, but the remedy of a cease and desist order or civil fine shall be in addition to any criminal liability. The cease and desist order is conclusive proof of unlicensed practice and may be enforced under RCW 7.21.060. This method of enforcement of the cease and desist order or civil fine may be used in addition to, or as an alternative to, any

provisions for enforcement of agency orders set out in chapter 34.05 RCW.

(6) The attorney general, a county prosecuting attorney, the secretary, a board, or any person may in accordance with the laws of this state governing injunctions, maintain an action in the name of this state to enjoin any person practicing a profession or business for which a license is required by the chapters specified in RCW 18.130.040 without a license from engaging in such practice or operating such business until the required license is secured. However, the injunction shall not relieve the person so practicing or operating a business without a license from criminal prosecution therefor, but the remedy by injunction shall be in addition to any criminal liability.

(7) Unlicensed practice of a profession or operating a business for which a license is required by the chapters specified in RCW 18.130.040, unless otherwise exempted by law, constitutes a gross misdemeanor for a single violation. Each subsequent violation, whether alleged in the same or in subsequent prosecutions, is a class C felony. All fees, fines, forfeitures, and penalties collected or assessed by a court because of a violation of this section shall be remitted to the health professions account.

. . . .

**RCW 18.130.200. Fraud or misrepresentation in obtaining or maintaining a license—Penalty.**

A person who attempts to obtain, obtains, or attempts to maintain a license by willful misrepresentation or fraudulent representation is guilty of a gross misdemeanor.

**RCW 18.130.210. Crime by license holder—Notice to attorney general or county prosecuting attorney.**

If the disciplining authority determines or has cause to believe that a license holder has committed a crime, the disciplining authority, immediately subsequent to issuing findings of fact and a final order, shall notify the attorney general or the county prosecuting attorney in the county in which the act took place of the facts known to the disciplining authority.

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## WASH. REV. CODE 34.05
## ADMINISTRATIVE PROCEDURE ACT

**RCW 34.05.446. Subpoenas, discovery, and protective orders.**

(1) The presiding officer may issue subpoenas and may enter protective orders. A subpoena may be issued with like effect by the agency or the attorney of record in whose behalf the witness is required to appear.

(2) An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used.

(3) Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented

by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(4) Discovery orders and protective orders entered under this section may be enforced under the provisions of this chapter on civil enforcement of agency action.

(5) Subpoenas issued under this section may be enforced under RCW 34.05.588(1).

(6) The subpoena powers created by this section shall be state-wide in effect.

(7) Witnesses in an adjudicatory proceeding shall be paid the same fees and allowances, in the same manner and under the same conditions, as provided for witnesses in the courts of this state by chapter 2.40 RCW and by RCW 5.56.010, except that the agency shall have the power to fix the allowance for meals and lodging in like manner as is provided in RCW 5.56.010 as to courts. The person initiating an adjudicative proceeding or the party requesting issuance of a subpoena shall pay the fees and allowances and the cost of producing records required to be produced by subpoena.

**RCW 34.05.449. Procedure at hearing.**

(1) The presiding officer shall regulate the course of the proceedings, in conformity with applicable rules and the prehearing order, if any.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence,

except as restricted by a limited grant of intervention or by the prehearing order.

(3) In the discretion of the presiding officer, and where the rights of the parties will not be prejudiced thereby, all or part of the hearing may be conducted by telephone, television, or other electronic means. Each party in the hearing must have an opportunity to participate effectively in, to hear, and, if technically and economically feasible, to see the entire proceeding while it is taking place.

(4) The presiding officer shall cause the hearing to be recorded by a method chosen by the agency. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.

(5) The hearing is open to public observation, except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules. A presiding officer may order the exclusion of witnesses upon a showing of good cause. To the extent that the hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

**RCW 34.05.452. Rules of evidence—Cross-examination.**

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

(3) All testimony of parties and witnesses shall be made under oath or affirmation.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

**RCW 34.05.458. Separation of functions.**

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its preadjudicative stage, or one who is subject to the authority, direction, or discretion of such a person, may not serve as a presiding officer in the same proceeding.

(2) A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

(3) A person may serve as presiding officer at successive stages of the same adjudicative proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

**RCW 34.05.514. Petition for review—Where filed.**

(1) Except as provided in subsection (2) of this section, proceedings for review under this chapter shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.

(2) For proceedings involving institutions of higher education, the petition shall be filed either in the county in which the principal office of the institution involved is located or in the county of a branch campus if the action involves such branch.

**RCW 34.05.530. Standing.**

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

**RCW 34.05.542. Time for filing petition for review.**

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record

within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

**RCW 34.05.546. Petition for review—Contents.**

A petition for review must set forth:

(1) The name and mailing address of the petitioner;

(2) The name and mailing address of the petitioner's attorney, if any;

(3) The name and mailing address of the agency whose action is at issue;

(4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

(5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

(7) The petitioner's reasons for believing that relief should be granted; and

(8) A request for relief, specifying the type and extent of relief requested.

**RCW 34.05.550. Stay and other temporary remedies.**

(1) Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy.

(2) After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.

(3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:

(a) The applicant is likely to prevail when the court finally disposes of the matter;

(b) Without relief the applicant will suffer irreparable injury;

(c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

(4) If the court determines that relief should be granted from the agency's action granting a stay or other temporary remedies, the court may remand the matter or may enter an order denying a stay or granting a stay on appropriate terms.

**RCW 34.05.554. Limitation on new issues.**

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

**RCW 34.05.558. Judicial review of facts confined to record.**

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

**RCW 34.05.562. New evidence taken by court or agency.**

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

**RCW 34.05.570. Judicial review.**

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or RCW 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may

file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

**RCW 34.05.574. Type of relief.**

(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its

discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

(2) The sole remedy available to a person who is wrongfully denied licensure based upon a failure to pass an examination administered by a state agency, or under its auspices, is the right to retake the examination free of the defect or defects the court may have found in the examination or the examination procedure.

(3) The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law.

(4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.

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# WASH. ADMIN. CODE 246-11
# MODEL PROCEDURAL RULES FOR BOARDS

## WAC 246-11-001 Purpose and application of chapter.

(1) This chapter contains model rules for adjudicative proceedings authorized to be conducted under the authority of a board having disciplining authority under the Uniform Disciplinary Act, chapter 18.130 RCW. Each board may adopt these rules as contained in this chapter or as modified.

(2) This chapter, as modified and adopted by the board, shall apply to adjudicative proceedings authorized to be conducted under the authority of the board.

(3) This chapter applies to adjudicative proceedings begun on or after the effective date of this chapter in programs administered by the board. For purposes of this section, "begun" shall mean the receipt by the appropriate office of an application for an adjudicative proceeding. These rules shall be the exclusive rules governing adjudicative proceedings under the jurisdiction of the board.

(4) To the extent that these rules differ by inclusion, deletion, or content from the model rules adopted by the chief administrative law judge pursuant to RCW 34.05.250, this chapter shall prevail in order to provide a process consistent with the organization of the department and the board.

(5) Where a provision of this chapter conflicts with another chapter of Title 246 WAC, the provision of this chapter shall prevail.

(6) Where a provision of this chapter conflicts with a provision of the Revised Code of Washington, the statute shall prevail.

**WAC 246-11-010 Definitions.**

As used in these rules of practice and procedure, the following terms shall have the meaning set forth in this section unless the context clearly indicates otherwise. Other terms shall have their ordinary meaning unless defined elsewhere in this chapter.

"Adjudicative clerk office" shall mean the unit with responsibility for: Docketing; service of orders; and maintaining custody of the adjudicative proceeding record, whose address is:

Department of Health
Adjudicative Clerk Office
2413 Pacific Avenue
PO Box 47879
Olympia, WA 98504-7879

"Adjudicative proceeding" or "hearing" shall mean a proceeding required by statute or constitutional right and conducted under the rules of this chapter, which provides an opportunity to be heard by the board prior to the entry of a final order under this chapter.

"Board" shall mean a disciplining authority under RCW 18.130.040 (2)(b) and (3).

"Brief adjudicative proceeding" shall mean an adjudicative proceeding or hearing, the scope or conduct of which is limited as provided in this chapter.

"Department" shall mean the Washington state department of health and, where appropriate, the secretary of the Washington state department of health or the secretary's designee.

"Docket" or "docketing" shall mean the list or calendar of causes set to be heard at a specified time, prepared by the adjudicative clerk office for the use of the department.

"Filing" shall mean receipt by the adjudicative clerk office.

"Initiating document" shall mean a written agency document which initiates action against a license holder or applicant for license and which creates the right to an adjudicative proceeding. It may be entitled a statement of charges, notice of intent to deny, or by any other designation indicating the action or proposed action to be taken.

"License" shall have the meaning set forth in RCW 34.05.010 and includes license to practice the profession for which the board is the disciplining authority and any approval of school or curriculum required by law or rule to be obtained from the board.

"Presiding officer" shall mean the person who is assigned to conduct an adjudicative proceeding and who may either be a member of the board, an individual appointed pursuant to RCW 18.130.095(3), or an administrative law judge employed by the office of administrative hearings.

"Presiding officer for brief adjudicative proceedings" shall mean an employee of the department authorized by the board to conduct brief adjudicative proceedings.

"Program" shall mean the administrative unit within the department responsible for implementation of that chapter of Title 18 RCW establishing the board or its powers and responsibilities.

"Prompt adjudicative proceeding" or "prompt hearing" shall mean a hearing conducted at the request of the license holder or applicant for license following summary action taken in

accord with this chapter against that license holder or applicant.

"Protective order" shall mean an order issued under this chapter which limits the use of, access to, or disclosure of information or evidence.

"Respondent" shall mean a license holder or applicant for license under the jurisdiction of the board who is named in an initiating document.

"Secretary" shall mean the secretary of the department of health or his/her designee.

"Summary action" shall mean an agency action to address an immediate danger to the public health, safety, or welfare and shall include, but not be limited to, a cease and desist order, an order of summary suspension, and an order of summary restriction of a license.

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**WAC 246-11-030 Appearance of parties.**

If a respondent requests an adjudicative proceeding to contest the action, that party shall appear at all stages of the proceeding except as otherwise provided in this section.

(1) If the respondent is represented as provided in this chapter, the respondent shall appear personally at the hearing and at any scheduled settlement conference but need not appear at the prehearing conference or at presentation of motions.

(2) Parties may be represented by counsel at all proceedings.

(3) The respondent may appear by telephone at any portion of the proceedings conducted by telephone, in the discretion of the presiding officer following reasonable advance notice to the presiding officer and to the opposing party.

(4) The requirement of personal appearance may be waived for good cause in the discretion of the presiding officer.

(5) Failure to appear as provided in this chapter shall be grounds for taking final action by default.

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**WAC 246-11-070 Representation.**

(1) License holders, applicants for license, and recipients of benefits may be represented subject to the following conditions:

(a) A license holder or applicant for license may represent himself/herself or may be represented by an attorney who has complied with the admission to practice rules of the supreme court of the state of Washington;

(b) Every attorney representing a license holder or applicant for license shall file a notice of appearance with the adjudicative clerk office upon commencing representation, and shall file a notice of withdrawal of counsel with the adjudicative clerk office upon terminating representation.

(c) No license holder or applicant may be represented in an adjudicative proceeding by an employee of the department.

(2) No current or former employee of the department may appear as an expert, character witness, or representative of any party other than the state of Washington if he/she took an active part in investigating or evaluating the case or

represented the agency in the matter, unless written permission of the secretary is granted. No current or former member of the attorney general's office staff who participated personally and substantially in investigating or evaluating the matter at issue while so employed may represent a party or otherwise participate in a related proceeding without first having obtained the written consent of the attorney general's office.

**WAC 246-11-080 Service and filing.**

(1) A party filing a pleading, brief, or paper other than an initiating document or application for an adjudicative proceeding as required or permitted by these rules, shall serve a copy of the paper upon the opposing party or any designated representative of the opposing party prior to or simultaneous with filing.

(2) Unless otherwise provided by law, filing and service shall be made by personal service; first class, registered, or certified mail.

(3) Filing shall be complete upon actual receipt during normal business hours at the adjudicative clerk office, unless filing is directed in writing to be made to another address.

(4) Service shall be complete when personal service is made; mail is properly stamped, addressed, and deposited in the United States mail.

(5) Proof of service shall consist of filing as required by these rules, together with one of the following:

(a) An acknowledgement of service;

(b) A certificate of service including the date the papers were served, the parties upon whom served, the signature of the serving party, and a statement that service was completed by:

(i) Personal service; or

(ii) Mailing in the United States mail a copy properly addressed with postage and fees prepaid to each party and each designated representative.

**WAC 246-11-090 Jurisdiction.**

(1) The board has jurisdiction over all licenses issued by the board and over all holders of and applicants for licenses as provided in RCW 18.130.040 (2)(b) and (3). Such jurisdiction is retained even if an applicant requests to withdraw the application, or a licensee surrenders or fails to renew a license.

(2) The department has jurisdiction over unlicensed practice of any activity for which a license is required.

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**WAC 246-11-160 Official notice and agency expertise.**

(1) Official notice may be taken as provided in RCW 34.05.452(5).

(2) The board may use its expertise and specialized knowledge to evaluate and draw inferences from the evidence presented to it.

**WAC 246-11-170 Sanctions.**

(1) Orders may include sanctions against either party.

(2) Grounds for sanctions may include:

(a) Failure to comply with these rules or orders of the presiding officer; and

(b) Willful interference with the progress of proceedings.

(3) Sanctions may include:

(a) Dismissal of the matter;

(b) Proceeding in default; and

(c) Other sanctions as appropriate.

(4) The order shall state the grounds upon which any sanctions are imposed.

**WAC 246-11-180 Intervention.**

(1) The presiding officer may grant a petition for intervention pursuant to RCW 34.05.443.

(2) A request to intervene shall be handled as a prehearing motion and shall be subject to the dates contained in the scheduling order. Within the sound exercise of discretion, the presiding officer may allow intervention if:

(a) The intervenor is not a party to the matter but has a substantial interest in outcome of the matter and the interest of the intervenor is not adequately represented by a party, or other good cause exists; and

(b) Any representative of the intervenor meets the requirements of WAC 246-11-070.

(3) A person shall not be allowed to intervene if that person had notice of the board's decision and, upon timely application, would have been able to appear as a party in the matter in which intervention is sought, but failed to make such timely application.

(4) If intervention is granted, the intervenor shall be subject to these rules on the same basis as the other parties to the proceeding, unless otherwise limited in the order granting intervention.

**WAC 246-11-190 Form of pleadings and orders.**

(1) Pleadings, orders, and other papers filed, served, or entered under this chapter shall be:

(a) Captioned with the name of the state of Washington, the name of the board, and the title and cause number, if any, of the proceeding; and

(b) Signed by the person filing, serving, or entering the document. When that person is an attorney representing a party, the signature block shall include the attorney's Washington State Bar Association number.

(2) All orders shall comply with RCW 34.05.461 and the requirements of this chapter.

**WAC 246-11-200 Notice to limited-English-speaking parties.**

When the program or the adjudicative clerk office is notified or otherwise made aware that a limited-English-speaking person is a party in an adjudicative proceeding, all notices concerning the hearing, including notices of hearing, continuance, and dismissal, shall either be in the primary language of the party or shall include a notice in the primary

language of the party which describes the significance of the notice and how the party may receive assistance in understanding and, if necessary, responding to the notice.

**WAC 246-11-210 Interpreters.**

(1) A "hearing impaired person" means a person who, because of a hearing impairment or speech defect cannot readily understand or communicate in spoken language. A "hearing impaired person" includes a person who is deaf, deaf and blind, or hard of hearing.

(2) A "limited-English-speaking person" means a person who because of a non-English speaking cultural background cannot readily speak or understand the English language.

(3) If a hearing impaired person or a limited-English-speaking person is involved in an adjudicative proceeding and a need for an interpreter is made known to the adjudicative clerk office, the presiding officer shall appoint an interpreter who is acceptable to the parties or, if the parties are unable to agree on an interpreter, the presiding officer shall select and appoint an interpreter.

(4) Before beginning to interpret, an interpreter shall take an oath or make affirmation that:

(a) A true interpretation shall be made to the impaired person of all the proceedings in a language or in a manner the impaired person understands; and

(b) The interpreter shall repeat the statements of the impaired person to the presiding officer, in the English language, to the best of the interpreter's skill and judgment.

(5) When an interpreter is used in a proceeding:

(a) The interpreter shall translate all statements made by other participants in the proceeding;

(b) The presiding officer shall ensure sufficient extra time is provided to permit translation; and

(c) The presiding officer shall ensure that the interpreter translates the entire proceeding to the hearing impaired person or limited-English-speaking person to the extent that the person has the same opportunity to understand the statements made as would a person not requiring an interpreter.

(6) An interpreter appointed under this section shall be entitled to a reasonable fee for services, including waiting time and reimbursement for actual necessary travel expenses. The program shall pay the interpreter fee and expenses incurred for interpreters for license holders, applicants, or recipients of benefits. The party on whose behalf a witness requiring an interpreter appears shall pay for interpreter services for that witness.

(7) All proceedings shall be conducted consistent with chapters 2.42 and 2.43 RCW.

**WAC 246-11-220 Subpoenas.**

(1) The board, through the presiding officer, or other designated person, and attorneys for parties may issue subpoenas to residents of the state of Washington, to license holders and applicants for license, and to other persons or entities subject to jurisdiction under RCW 4.28.185.

(2) The presiding officer shall issue subpoenas pursuant to RCW 34.05.446(1) for parties not represented by counsel upon request of the party and upon a showing of relevance and reasonable scope of the testimony or evidence

sought. Requests for issuance of subpoenas must be made in writing to the presiding officer stating the relevance and the scope of testimony or evidence sought.

(3) The person on whose behalf the subpoena is issued shall pay any witness fees and expenses as provided in WAC 246-11-140 or costs for interpreters for such witnesses as provided in WAC 246-11-210.

(4) Attendance of persons subpoenaed and production of evidence may be required at any designated place in the state of Washington.

(5) Every subpoena shall:

(a) Comply with WAC 246-11-190;

(b) Identify the party causing issuance of the subpoena;

(c) State the title of the proceeding; and

(d) Command the person to whom the subpoena is directed to attend and give testimony and/or produce designated items under the person's control at a specified time and place.

(6) A subpoena may be served by any suitable person eighteen years of age or older by:

(a) Giving a copy to the person to whom the subpoena is addressed;

(b) Leaving a copy at the residence of the person to whom the subpoena is addressed with a person of suitable age and discretion;

(c) Sending a copy by mail to the current address on file with the program if the person is licensed by the board or has filed an application for a license with the board; or

(d) Sending a copy by certified mail with proof of receipt if the person is neither licensed by nor has applied for a license with the board.

(7) Proof of service may be made by:

(a) Affidavit of personal service;

(b) Certification by the person mailing the subpoena to a license holder or applicant; or

(c) Return or acknowledgment showing receipt by the person subpoenaed or his/her representative. Any person accepting certified or registered mail at the last known address of the person subpoenaed shall be considered an authorized representative.

(8) The presiding officer, upon motion made promptly and before the time specified for compliance in the subpoena, may:

(a) Quash or modify the subpoena if the subpoena is unreasonable or requires evidence not relevant to any matter at issue; or

(b) Condition denial of the motion upon just and reasonable conditions, including advancement of the reasonable cost by the person on whose behalf the subpoena is issued of producing the books, documents, or tangible things; or

(c) Issue a protective order under RCW 34.05.446.

(9) The board may seek enforcement of a subpoena under RCW 34.05.588(1) or proceed in default pursuant to WAC 246-11-280.

**WAC 246-11-230 Presiding officer and panel members.**

(1) The board may appoint one or more persons as presiding officer for brief adjudicative proceedings as provided in WAC 246-11-430(1).

(2) The board shall authorize one of the following to serve as presiding officer for adjudicative proceedings:

(a) A board member; or

(b) An individual appointed pursuant to RCW 18.130.095(3); or

(c) An administrative law judge employed by the office of administrative hearings.

(3) The board may designate certain of its members to hear a matter as a hearing panel as provided by law.

(4) Any party may move to disqualify the presiding officer, or a member of the board hearing the matter, as provided in RCW 34.05.425(3).

**WAC 246-11-250 Form and content of initiating documents.**

(1) Initiating documents shall include a clear and concise statement of the:

(a) Identity and authority of the person issuing the document;

(b) Factual basis for the action or proposed action set forth in the document;

(c) Statutes and rules alleged to be at issue;

(d) Identity of the party against whom the action is taken or proposed to be taken;

(e) Action or proposed action or penalties, including the statutory or rule authority for those actions or penalties;

(f) Signature of the person issuing the document and the date signed; and

(g) Method by which an adjudicative proceeding may be requested.

(2) Initiating documents shall be accompanied by the following documents:

(a) Notice that the respondent may defend against the action or proposed action; and

(b) Form for requesting adjudicative proceeding.

(3) Initiating documents shall be served as described in WAC 246-11-080.

**246-11-260. Amendment of initiating documents.**

(1) Prior to the hearing date, initiating documents may be amended subject to the following conditions:

(a) Amended initiating documents shall meet the requirements of WAC 246-11- 250(1);

(b) Amended initiating documents shall be accompanied by the documents described in WAC 246-11-250(2);

(c) Whenever amended initiating documents are issued, a new interval for response will begin, as described in WAC 246-11-270, unless the respondent requests the time periods set by the original initiating document; and

(d) Issuance of amended initiating documents ends all obligations of the parties under the prior initiating documents.

(2) On the hearing date, the initiating documents may be amended subject to the following conditions:

(a) The documents may be amended upon motion of the state;

(b) The documents may not be amended without the approval of the presiding officer; and

(c) Upon motion of a party or upon his/her own initiative, the presiding officer may grant a continuance on all or part of the matter if necessary to afford the respondent an opportunity to prepare a defense to the amended documents.

**246-11-270. Request for adjudicative proceeding.**

A respondent may respond to an initiating document by filing an application for an adjudicative proceeding or by waiving the opportunity for adjudicative proceeding.

(1) If the respondent wishes to file an application for an adjudicative proceeding:

(a) An application for adjudicative proceeding must be filed in accordance with the following time periods:

(i) For matters under chapter 18.130 RCW, the Uniform Disciplinary Act, within twenty days of service of the initiating documents unless and extension has been granted as provided in subsection (3) of this section; and

(ii) For all other matters, within twenty days of service of the initiating documents, unless otherwise provided by statute.

(b) The application for adjudicative proceeding shall be made on the Request for Adjudicative Proceeding form accompanying the initiating documents or by a written document including substantially the same information.

(c) By filing a request for adjudicative proceeding, the responding party agrees to appear personally at the adjudicative proceeding or, if otherwise approved by the presiding officer, by telephone, unless appearance is waived as authorized in WAC 246-11-130(4).

(d) The application for adjudicative proceeding shall contain a response to the initiating documents, indicating whether each charge is admitted, denied or not contested, and responses shall be subject to the following conditions:

(i) Once admitted or not contested, an allegation may not be denied; and

(ii) An allegation denied or not contested may later be admitted.

(e) When an allegation is admitted or not contested, it shall be conclusively deemed to be true for all further proceedings. No proof of the allegation need be submitted.

(f) The application for adjudicative proceeding shall specify the representative, if any, designated pursuant to WAC 246-11-070 and any request for interpreter. The responding party shall amend the name of the representative and need for interpreter immediately if circumstances change prior to the hearing.

(g) The application for adjudicative proceeding shall be filed at the adjudicative clerk office.

(2) A respondent may waive an adjudicative proceeding and submit a written statement and other documents in defense or in mitigation of the charges. Such waiver and documents shall be filed:

(a) In accordance with the timelines in subsection (1)(a) of this section; and

(b) At the address indicated in subsection (1)(g) of this section.

(3) For matters under RCW 18.130.180, if the twenty-day limit for filing an application for adjudicative proceeding results in a hardship to the respondent, the respondent may request an extension of not more than sixty days upon a showing of good cause.

(a) The request for extension shall be filed within the twenty-day limit and shall include:

(i) The reason for the request and the number of days for which the extension is requested; and

(ii) Documentation of the circumstances creating the hardship.

(b) The request shall be granted for a period not to exceed sixty days upon showing of:

(i) Illness of the respondent; or

(ii) Absence of the respondent from the county of residence or employment; or

(iii) Emergency in the respondent's family; or

(iv) Other good cause as determined by the presiding officer.

(c) If a request for extension is denied, the respondent shall have ten days from service of the order denying the extension or twenty days from service of the initiating documents, whichever is longer, to file an application for adjudicative proceeding.

**246-11-280. Default.**

(1) If a party fails to respond to initiating documents according to WAC 246-11-270, that party will be deemed to have waived the right to a hearing, and the board shall enter a final order without further contact with that party.

(2) If a party requests an adjudicative proceeding but fails to appear, without leave to do so, at a scheduled prehearing conference, the presiding officer may issue an order of default. The order shall include notice of opportunity to request that the default order be vacated pursuant to RCW 34.05.440(3). Unless vacated, a default order under this subsection shall be grounds for the board to proceed to decide the matter in the absence of the respondent and without additional notice to the respondent and to issue a final order.

(3) If a party requests an adjudicative proceeding but fails to appear at the hearing, the presiding officer may issue an order of default in the same manner as subsection (2) of this section, or may proceed to hear the matter in the absence of the party and issue a final order.

(4) Final orders entered under this section shall contain:

(a) Findings of fact and conclusions of law based upon prima facie proof of the allegations contained in the initiating documents;

(b) Proof of service of or a good faith attempt to serve initiating documents and appropriate notices;

(c) A finding that there is no reason to believe that the party in default is in active military service;

(d) The penalties or conditions imposed by the order; and

(e) Notice of the opportunity to request reconsideration pursuant to RCW 34.05.470.

(5) Final and default orders entered under this section shall be served upon the parties in accordance with WAC 246-11-080.

**WAC 246-11-290 Scheduling orders.**

(1) Within thirty days after receipt of the application for adjudicative proceeding, the board or designee thereof, shall:

(a) Approve the application for full adjudicative procedure and issue and serve on the parties a scheduling order or other scheduling mechanism establishing timelines for discovery, settlement, and scheduled hearings; or

(b) Approve the application for a brief adjudicative procedure and issue and serve a notice of the date by which any additional written materials are to be submitted for consideration; or

(c) Deny the application according to RCW 34.05.416.

(2) If a scheduling order is issued:

(a) The scheduling order shall specify:

(i) The date, time, and place of a settlement conference, a prehearing conference, and the hearing;

(ii) The deadlines for completion of discovery and submission of prehearing motions; and

(iii) The name, address, and telephone number of the assistant attorney general or other department representative who will represent the state in the matter.

(b) The scheduling order may be modified by order of the presiding officer upon his/her own initiative or upon motion of a party. Any request for change of the scheduling mechanism or order shall be made by motion as provided in WAC 246-11-380.

(c) The presiding officer may waive establishing dates for the settlement conference, completion of discovery, submission of prehearing motions, and the prehearing conference, if, in the discretion of the presiding officer, those proceedings are not necessary or appropriate in a particular matter or type of case. However, either party may request by motion to the presiding officer that any or all of the dates be set.

(d) Dates contained in the scheduling order may be changed by the adjudicative clerk office upon written request of either party made within fifteen days of issuance of the first scheduling order. All other changes must be made by motion pursuant to WAC 246-11-380.

**246-11-300. Conduct of emergency adjudicative proceedings.**

(1) Summary action may be taken only after a review by the board of such evidence, including affidavits, if appropriate, to establish:

(a) The existence of an immediate danger to the public health, safety, or welfare;

(b) The board's ability to address the danger through a summary action, and

(c) The summary action necessary to address the danger.

(2) No notice to any person potentially affected by a summary action shall be required prior to issuance of a summary action.

**246-11-310. Effect of summary action.**

(1) Summary action takes effect upon entry of the order.

(2) No person shall be required to comply with a summary action until service has been made or the person has knowledge of the order, whichever occurs first.

(3) A summary action shall be served as promptly as practicable, in accordance with WAC 246-11-080.

(4) A summary action shall not be subject to the post hearing process provided in WAC 246-11-550 through 246-11-610, but a summary action may be appealed to superior court as provided by law.

**246-11-320. Form and content of summary actions.**

(1) A summary action shall be entered in the form of an order containing findings of fact, conclusions of law, and the summary action imposed, as well as a statement of policy reasons for the decision.

(2) A summary action imposed by emergency adjudicative proceeding shall be limited to those actions necessary to alleviate an immediate danger to the public health, safety, or welfare.

(3) Initiating documents, and all other documents required by WAC 246-11- 250 shall accompany a summary action order when served.

**246-11-330. Adjudicative proceedings upon summary action.**

Following summary action taken by the board, the respondent may:

(1) Request a prompt adjudicative proceeding conducted in accordance with this chapter; or

(2) Waive the prompt adjudicative proceeding and request a regularly scheduled adjudicative proceeding conducted in accordance with this chapter;

(3) Waive the right to an adjudicative proceeding and submit a written statement to be considered prior to the entry of the final order; or

(4) Waive the opportunity to be heard.

**246-11-340. Opportunity for prompt adjudicative proceeding.**

(1) Any respondent affected by a summary action shall be provided the opportunity to request a prompt adjudicative proceeding. Notice of the opportunity shall be provided in the notice of opportunity to defend against the allegations that are the basis for the summary action. The form for requesting an adjudicative proceeding shall include the option of requesting a prompt adjudicative proceeding.

(2) Any respondent affected by a summary action may request an prompt adjudicative proceeding, may elect a regularly scheduled adjudicative proceeding instead of a prompt adjudicative proceeding, or may waive the opportunity for adjudicative proceeding in accord with WAC 246-11-270.

(3) Any request for a prompt adjudicative proceeding must be filed within ten days of the service of the summary action.

(4) If requested by the respondent, a prompt adjudicative proceeding shall be conducted within twenty days of service of a summary action.

(5) Regardless whether a prompt adjudicative proceeding is requested, the matter shall be resolved as quickly as feasible in accordance with all other applicable rules.

**246-11-350. Proceedings prior to prompt adjudicative proceeding.**

A settlement conference may be requested, a settlement may be offered, and a prehearing conference may be conducted prior to a prompt adjudicative proceeding. Prehearing proceedings shall not delay a prompt adjudicative proceeding except by mutual agreement of the parties.

**246-11-360. Settlement conference.**

(1) Following a request for an adjudicative proceeding, a settlement conference shall be conducted if provided in the scheduling order. If another scheduling mechanism is issued, a settlement conference may be scheduled and held at the discretion of the board or other settlement processes may be utilized at the discretion of the board.

(2) The purpose of the settlement conference or other settlement process shall be to attempt to reach agreement on the issues and on a proposed order to be entered. Any agreement of the parties is subject to final approval by the board.

(3) The respondent shall attend the settlement conference as scheduled and may also be represented as provided in WAC 246-11-070. Representatives of the board and/or department will also attend. Other persons may attend by agreement of the parties.

(4) Either party may bring documents or other materials to the settlement conference for the purpose of settlement negotiations. No testimony will be taken. No documents or information submitted at the settlement conference will be admitted at the adjudicative proceeding unless stipulated by the parties or otherwise admitted into evidence by the presiding officer.

(5) If a settlement offer has been made in writing to the respondent and it is signed and returned by the respondent to the board prior to the settlement conference, all subsequent dates set in the scheduling order or other scheduling mechanism are continued pending final review of the settlement by the board.

**246-11-370. Discovery.**

The parties are encouraged to exchange information and documents related to the case prior to the adjudicative proceeding. Formal discovery is obtained as follows:

(1) Methods, scope and limits:

(a) Parties may obtain discovery by production of records or things; deposition upon oral examination; requests for admission; or, if ordered by the presiding officer, written interrogatories.

(b) Unless otherwise limited by order of the presiding officer in accord with these rules, the scope of discovery shall be as follows:

(i) Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter in the pending action. It is not grounds for objection that the information sought will be inadmissible at the adjudicative proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(ii) The frequency or extent of use of the discovery methods set forth in these rules shall be limited by the presiding officer if the presiding officer determines that:

(A) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive; or

(B) The party seeking discovery has had an ample opportunity by discovery to obtain the information sought; or

(C) The discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations of the parties' resources, and the importance of the issues at stake.

(iii) The presiding officer may limit discovery upon his or her own initiative after reasonable notice or pursuant to a motion submitted by a party.

(2) Production of records, documents, or things:

(a) Upon written request of a party the opposing party shall identify experts and other witnesses to be called at the hearing and shall provide other information necessary to enable the party to conduct depositions of the witnesses.

(b) Any party may serve on any other party a request, which must be signed by the party or designated representative:

(i) To produce and permit the party making the request or designee to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of discovery and which are in the possession, custody or control of the party upon whom the request is served; or

(ii) To permit entry onto designated land or other property which is in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or designated object or operation thereon which is within the scope of discovery.

(c) Any party who produces documents for inspection shall produce them as they are kept in the usual course of business or may, if the parties agree, organize and label them to correspond with the categories in the request.

(d) The party upon whom a request is made may, by motion to the presiding officer, move for an order denying the request to produce or modify the conditions of the request. Denial of the request of change in the conditions of the request shall be within the discretion of the presiding officer and shall be made by written order.

(3) Depositions may be taken subject to the following conditions:

(a) Within the United States or a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the state of Washington or of the place where the examination is held. A presiding officer may, in his or her discretion or following motion of a party, preside at the deposition. Within a foreign country, depositions shall be taken before a secretary of an embassy or legation, consul general, vice-consul or consular agent of the United States, or a person designated by the presiding officer or agreed upon by the parties by stipulation in writing filed with the presiding officer, if any, and otherwise with the disciplining authority. Except by stipulation, no deposition shall be taken before any person who is a party or a privy of a party, or a privy of a representative of a party, or who is financially interested in the proceeding.

(b) A party desiring to take the deposition of a person upon oral examination shall give reasonable notice of not less than five days in writing to the person to be deposed and to the opposing party. The notice shall state the time and place for taking the deposition, the name and address of each person to be examined, if known, and if the name is not known, a description sufficient to identify the person to be examined or the particular class or group to which the person to be examined belongs. On motion of a party upon whom the

notice is served, the presiding officer may for cause shown, lengthen or shorten the time.

(c) After notice is served for taking a deposition, or upon motion of the presiding officer, or upon motion reasonably made by any party or by the person to be examined, and upon notice and for good cause, the presiding officer may issue an order that the deposition shall not be taken or that it be taken subject to specified restrictions, conditions, or limitations.

(d) Depositions shall be recorded.

(i) The officer before whom the deposition is taken shall put the witness on oath or affirmation and shall personally or by someone acting under the officer's direction and in the officer's presence, record the testimony.

(ii) The officer or person acting under the officer's direction shall transcribe the testimony at the request of any party, provided that any expenses shall be paid by the requesting party.

(iii) The transcribed testimony shall be submitted to the person deposed for review and signature, unless review and signature are waived by that person. The officer shall append to the transcript any changes in form or substance that may be submitted by the parties.

(iv) Copies of the transcribed and, unless review and signature has been waived, signed testimony shall be served upon the person deposed and upon the parties.

(e) If the parties so stipulate in writing or on the record, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken, may be used as any other deposition.

(4) Following motion of a party and opportunity for response by the opposing party, the presiding officer may order a party to respond to written interrogatories and may order that the interrogatories be subject to specified restriction, condition, or limitation.

**246-11-380. Motions.**

(1) The presiding officer shall rule on motions. The presiding officer may rule on motions without oral argument or may request or permit the parties to argue the motion in person or by telephone. Oral argument may be limited in time at the discretion of the presiding officer.

(2) All prehearing motions, including discovery and evidentiary motions, shall be made in writing and filed prior to the dates set in the scheduling order. Filing shall be at the adjudicative clerk office, unless filing is directed in writing to be made at another address.

(3) Motions for continuance must be made in writing and filed prior to the dates set in the scheduling order. If the adjudicative proceeding is scheduled to take place fewer than twenty days from service of the scheduling order, motions for continuance must be made within ten days of service of the scheduling order, but in no event fewer than five days prior to the hearing. Continuances may be granted by the presiding officer for good cause.

(4) The presiding officer may grant a continuance when a motion for continuance is not submitted within the time limits contained in subsection (3) of this section for good cause.

(5) The following is the recommended format for motions:

(a) A succinct statement of the facts contended to be material;

(b) A concise statement of the issue, issues or law upon which the presiding officer is requested to rule;

(c) The specific relief requested by the moving party;

(d) If the motion requires the consideration of facts or evidence not appearing on the record, the moving party shall also serve and file copies of all affidavits and photographic or documentary evidence presented in support of the motion;

(e) The legal authority upon which the motion is based; and

(f) A proposed order may accompany the motion, and should contain findings of fact and conclusions of law.

(6) The moving party shall file the motion, and the accompanying affidavits and photographic or documentary evidence when necessary, with the board's office and with the presiding officer, and shall serve the motion, and the accompanying affidavits and photographic or documentary evidence when necessary, on all other parties.

(7) The opposing party shall file with the adjudicative clerk office, and serve upon the moving party, a responsive memorandum, and accompanying affidavits and photographic or documentary evidence when necessary, no later than eleven days following service of the motion, unless otherwise ordered by the presiding officer.

(8) The moving party may file with the adjudicative clerk office, and serve upon the opposing party, a reply memorandum no later than five days following service of the responsive memorandum, unless otherwise ordered by the presiding officer.

(9) Unless otherwise ordered by the presiding officer, all motions shall be decided without oral argument. A party

requesting oral argument on a motion shall so indicate by typing 'oral argument requested' in the caption of the motion or the responsive memorandum. If a request for oral argument is granted, the presiding officer shall notify the parties of the date and time of the argument and whether the argument will be in person or by telephone conference.

(10) Motions to shorten time or emergency motions shall be exceptions to the rule, and a party may only make such motions in exigent or exceptional circumstances. When making such a motion, the moving party shall:

(a) Suggest a date and time when the moving party seeks to have the presiding officer hear the motion to shorten time, which should be at least forty-eight hours after filing;

(b) Suggest a date and time when the moving party seeks to have the presiding officer consider the merits of the underlying motion;

(c) Describe the exigent or exceptional circumstances justifying shortening of time in an affidavit or a memorandum accompanying the motion;

(d) Certify that the motion to shorten time and the underlying motion have been served on all other parties prior to the filing of the motion with the presiding officer. Any opposition to the motion to shorten time must be served and filed within twenty-four hours of the service of the motion. If the presiding officer grants the motion to shorten time, the presiding officer shall notify the parties of the date by which the responsive memorandum to the underlying motion shall be served and filed.

(11) All motions will be decided as soon as practical, but not more than thirty days following the filing of the motion. If the presiding officer will not decide the motion within this time,

the presiding officer shall notify the parties in writing of the date by which the motion will be decided.

(12) If a party serves a motion or responsive memorandum by mail, pursuant to WAC 246-11-080, then three days shall be added to the time within which the opposing party must file and serve the responsive or reply memorandum. Service by electronic telefacsimile transmission (FAX) upon each party is permitted upon agreement of the parties, with proof of confirmation of service to be filed with the presiding officer.

(13) All computations of time shall be calculated pursuant to WAC 246-11- 040.

(14) Departmental motions for summary actions are exempted from all requirements of this section.

**246-11-390. Prehearing conference.**

(1) If a scheduling order is issued, the parties shall be notified of the time and place of the first prehearing conference in the scheduling order. If another scheduling mechanism is issued, a prehearing conference will be held upon motion of either party, unless board policy provides otherwise.

(2) The presiding officer shall determine whether the prehearing conferences will be conducted in person or by telephone conference call.

(3) The presiding officer shall conduct the prehearing conference and shall issue rulings related to prehearing motions and evidentiary issues. The rulings shall govern the conduct of subsequent proceedings.

(4) The prehearing conference may be recorded as ordered by the presiding officer. All offers of proof and objections

concerning matters raised at the prehearing conference must be made on the record at the prehearing conference.

(5) Following the final prehearing conference, the presiding officer shall issue a written prehearing order which will:

(a) Identify the issues to be considered at the hearing and indicate which party has the burden of proof on these issues;

(b) Specify the facts which are admitted or not contested by the parties;

(c) Identify those documents and exhibits that will be admitted at hearing and those which may be distributed prior to hearing;

(d) Identify expert and lay witnesses that may be called at hearing and the issues to which those witnesses may testify;

(e) Rule on motions;

(f) Accept amendments to the pleadings;

(g) Address such other issues or matters as may be reasonably anticipated to arise and which may aid in the disposition of the proceedings; and

(h) Rule on objections made in any preserved testimony.

(6) Following the prehearing conference, the presiding officer may issue an order directing that the matter be heard as a brief adjudicative proceeding, pursuant to WAC 246-11-420 through 246-11-450.

(7) Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding in the absence of a clear showing that

the offering party had good cause for failing to produce the evidence at the prehearing conference.

(8) Witnesses not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding in the absence of a clear showing that the party offering the testimony of such witness had good cause for failing to identify the witness at the prehearing conference.

(9) If the authenticity of documents submitted at the prehearing conference is not challenged at the prehearing conference, the documents shall be deemed authentic. However, a party shall be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to object at the prehearing conference.

(10) Nothing in these rules shall prohibit the presiding officer from conducting a conference at any time, including during the hearing. The presiding officer shall state on the record the results of such conference.

(11) A party bound by a stipulation or admission of record may withdraw it in whole or in part only upon a determination by the presiding officer or hearing officer that:

(a) The stipulation or admission was made inadvertently or as a bona fide mistake of fact or law; and

(b) The withdrawal will not unjustly prejudice the rights of the other parties.

(12) In an appeal to superior court involving issues addressed in the prehearing order, the record of the prehearing conference, written motions and responses the prehearing order and any orders issued by the presiding officer pursuant to WAC 246-11-380, shall be the record.

**246-11-400. Protective orders.**

The presiding officer may issue a protective order at his or her discretion:

(1) To protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense;

(2) To preserve confidentiality related to health care records or provider- client information;

(3) To protect examination processes;

(4) To protect the identity of a person supplying information to the department or board where the person indicates a desire for nondisclosure unless that person testifies or has been called to testify at an adjudicative proceeding; or

(5) To comply with applicable state or federal law.

. . . .

**246-11-470. Notice of adjudicative proceeding.**

Notice of an adjudicative proceeding shall be issued pursuant to RCW 34.05.434.

**246-11-480. Conduct of adjudicative proceeding.**

(1) The adjudicative proceeding shall be conducted as provided in RCW 34.05.449 through 34.05.455.

(2) The presiding officer may take the following actions to the extent not already determined in a prehearing order:

(a) Conduct the hearing de novo;

(b) Determine the order of presentation of evidence;

(c) Administer oaths and affirmations;

(d) Issue subpoenas;

(e) Rule on procedural matters, objections, motions, and offers of proof;

(f) Receive relevant evidence;

(g) Interrogate witnesses called by the parties in an impartial manner to develop any facts necessary to fairly and adequately decide the matter;

(h) Call additional witnesses and request additional exhibits deemed necessary to complete the record and receive such evidence subject to full opportunity for cross-examination and rebuttal by all parties;

(i) Take any appropriate action necessary to maintain order during the adjudicative proceeding;

(j) Determine whether to permit or require oral argument or briefs and determine the time limits for submission thereof;

(k) Permit photographic and recording equipment at hearing subject to conditions necessary to preserve confidentiality and prevent disruption;

(l) Permit a person to waive any right conferred upon that person by chapter 34.05 RCW or this chapter, except as precluded by law; and

(m) Take any other action necessary and authorized by applicable law or rule.

(3) The presiding officer shall:

(a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;

(b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules, and court decisions; and

(c) Not declare any statute or rule invalid.

(4) If the validity of any statute or rule is raised as an issue, the presiding officer may permit arguments to be made on the record concerning the issue for the purpose of subsequent review.

(5) Members of the board hearing the matter may ask questions of any witness and may call additional witnesses.

(6) A party may move to disqualify the presiding officer or any member of the board pursuant to RCW 34.05.425(3).

**246-11-490. Evidence.**

(1) The presiding officer shall rule on objections to the admissibility of evidence pursuant to RCW 34.05.452 unless those objections have been addressed in the prehearing order.

(2) The refusal of a witness to answer any question ruled proper shall be grounds for the presiding officer, at his/her discretion, to strike some or all prior testimony by that witness on related matters or to grant a continuance to allow a party to seek a court order to compel the witness to answer.

(3) Each person called as a witness in an adjudicative proceeding shall swear or affirm that the evidence about to be

given in the adjudicative proceeding shall be the truth under the provisions of RCW 5.28.020 through 5.28.060.

**246-11-500. Proposed order.**

At the conclusion of the hearing or by a date specified by the presiding officer, the presiding officer may require each party to submit to the presiding officer proposed findings of fact and conclusions of law and a proposed order.

**246-11-510. Issuance of final order.**

If the adjudicative proceeding is heard by the board or a panel of the board the presiding officer and board or panel of the board shall:

(1) Issue a final order containing findings of fact and conclusions of law and an order; and

(2) Cause the adjudicative clerk office to serve a copy of the order on each party and any designated representative of the party.

**246-11-520. Standard of proof.**

The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria. In all other cases the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence.

**246-11-530. Consolidated proceedings.**

(1) When two or more applications for adjudicative proceeding involve a similar issue, the applications may be consolidated by the presiding officer and the hearings conducted together. The presiding officer or hearings officer may consolidate on his/her own motion or upon the request of a party.

(2) A party scheduled for a consolidated proceeding may request to withdraw from the consolidated proceeding in favor of an individual proceeding. The presiding officer may grant a motion to withdraw from a consolidated proceeding at any time when good cause is shown.

(3) Each respondent in a consolidated proceeding shall retain the right to representation.

**246-11-540. Initial order.**

(1) If the adjudicative proceeding is not heard by the board or panel of the board the presiding officer shall:

(a) Issue an initial order containing proposed findings of fact, conclusions of law, and a proposed order;

(b) Cause the adjudicative clerk office to serve a copy of the initial order on each party and any designated representative of a party; and

(c) Forward the initial order and record of the adjudicative proceeding to the adjudicative clerk office.

(2) Initial orders on brief adjudicative proceedings shall become final orders as provided in WAC 246-11-540.

(3) Following receipt of initial orders in matters other than brief adjudicative proceedings, the board shall review the initial order and the record as provided in RCW 34.05.464, and issue a final order as provided in WAC 246-11-560.

**246-11-550. Appeal from initial order.**

(1) Any party may file a written petition for administrative review of an initial order issued under WAC 246-11-430 or 246-11-540 stating the specific grounds upon which exception is taken and the relief requested.

(2) Petitions for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within twenty-one days of service of the initial order.

(3) The opposing party may file a response to a petition for administrative review as provided in this section. The response shall be filed at the place specified in subsection (2) of this section. The party filing the response shall serve a copy of the response upon the party requesting administrative review. If the initial order was entered pursuant to WAC 246-11-430, the response will be filed within ten days of service of the petition. In all other matters, the response will be filed within twenty days of service of the petition.

**246-11-560. Final orders.**

(1) The form and content of final orders shall be as follows:

(a) Final orders shall contain findings of fact, conclusions of law, and an order. All final orders shall be signed by a member of the panel of board members who heard the matter.

(b) Final orders may adopt by reference the initial order in whole or in part.

(c) Final orders may modify or revise the initial order in whole or in part.

(2) Final orders shall be served upon the parties and their representatives as provided in WAC 246-11-080.

(3) Final orders shall be issued following:

(a) A review of the record;

(b) A review of the initial order, if any;

(c) A review of any request for review of the initial order and any response thereto; and

(d) Consideration of protection of the public health and welfare.

(4) Unless a later date is stated in the final order, final orders shall be effective when entered but a party shall not be required to comply with a final order until the order is served upon that party.

(5) Final orders may contain orders that specified portions of the agency record shall not be disclosed as public records if necessary to protect privacy interests, the public welfare, or vital governmental functions. Such orders shall include but are not limited to protective orders issued during the proceeding or pursuant to WAC 246-11-400.

**246-11-570. Stay of final orders.**

No final order will be stayed except by its own terms or by order of a court of competent jurisdiction.

**246-11-580. Reconsideration of final orders.**

(1)Within ten days of service of a final order, either party may file a petition for reconsideration, stating the specific grounds upon which reconsideration is requested and the relief requested.

(2) Grounds for reconsideration shall be limited to:

(a) Specific errors of fact or law; or

(b) Implementation of the final order would require department activities inconsistent with current department practice; or

(c) Specific circumstances render the person requesting the reconsideration unable to comply with the terms of the order.

(3) Petitions for reconsideration must be served upon the opposing party and filed with the adjudicative clerk office within ten days of service of the final order.

(4) If reconsideration is requested based on an error of fact, the request for reconsideration shall contain specific reference to the record. If reconsideration is requested based on testimony of record, the request for reconsideration shall contain specific reference to the testimony. The presiding officer may require that the party requesting reconsideration submit a copy of the transcript of the adjudicative proceeding and provide specific reference to the transcript.

(5) The petition for reconsideration is denied if, within twenty days of the date the petition is filed, the presiding officer:

(a) Denies the petition;

(b) Does not act upon the petition; or

(c) Does not serve the parties with notice of the date by which he/she will act on the petition.

(6) If the presiding officer determines to act upon the petition, the opposing party shall be provided at least ten days in which to file a response to the petition.

(7) Disposition of petitions for reconsideration shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings.

**246-11-590. Agency record of adjudicative proceedings.**

(1) The department shall maintain an official record of each adjudicative proceeding.

(2) The record shall include:

(a) Notices of all proceedings;

(b) Any prehearing order;

(c) Any motions, pleadings, briefs, petitions, and requests filed, and rulings thereon;

(d) Evidence received or considered;

(e) A statement of matters officially noted;

(f) Offers of proof and objections and rulings thereon;

(g) Any proposed findings, requested orders, and exceptions;

(h) Any recording of the adjudicative proceeding and any transcript of all or part of the adjudicative proceeding considered before final disposition of the matter;

(i) Any final order, initial order, or order on reconsideration; and

(j) Matters placed on the record following an ex parte communication, if any.

(3) The record shall be subject to disclosure as provided by RCW 42.17.250 through 42.17.340, and by WAC 246-11-130, except as limited by protective orders and provisions contained in the final order.

**246-11-600. Judicial review.**

(1) Judicial review of actions taken under this chapter shall be as provided in RCW 34.05.510 et seq.

(2) Notice of the opportunity for judicial review shall be provided in all final orders.

(3) Following a request for judicial review, the record forwarded to the reviewing court shall be those portions of the agency record designated by the parties within the time period set by the board.

**246-11-610. Vacating an order for reason of default or withdrawal.**

(1) A party may petition to vacate a default order entered against that party for failing to attend an adjudicative proceeding requested by that party by:

(a) Specifying the grounds relied upon in the petition; and

(b) Filing the petition at the adjudicative clerk office within seven days of service of the default order.

(2) The presiding officer shall consider the petition and shall:

(a) Grant the motion to vacate and reinstate the application for adjudicative proceeding, and may impose conditions on licensure pending final adjudication; or

(b) Deny the motion to vacate the default order.

No. 01-734

In The

# Supreme Court of the United States

WASHINGTON STATE MEDICAL
QUALITY ASSURANCE COMMISSION,

*Petitioner,*

v.

BANG DUY NGUYEN, M.D.,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court Of Washington**

## RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Every state licenses physicians to practice medicine and imposes sanctions for violating standards of professional conduct, which may include revocation of the license. Thirty states have chosen preponderance of the evidence as the burden of proof, necessary to establish a violation. The State of Washington, as one of those thirty states had also chosen the preponderance rule.

> Does the Due Process Clause of the Fourteenth Amendment require the state of Washington to apply the clear and convincing evidence standard of proof to revoke a license to practice medicine instead of the preponderance of the evidence standard?

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Bang Duy Nguyen M.D., the respondent respectfully opposes the granting of a Petition for Writ of Certiorari in this case.

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## OPINIONS BELOW

The Respondent agrees with the statement of the Petitioner setting forth the account of the Opinions rendered below.

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees that the Petitioner has listed the Laws of the State of Washington and that they are set out in the Petitioner's appendix.

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## RESPONDENT'S COUNTER STATEMENT

The Respondent's Counter Statement begins with this question: What dangers has the Petitioner demonstrated will result from application of due process principles as defined by the Washington Supreme Court decision? The answer is: None.

What is the effect of the Washington State Supreme Court's decision in this case? The answer is: "The institution of the government exercising its power through an administrative agency will have to use more care when prosecuting its citizens."

Regardless of the assertion of the Petitioner that every state in the United States licenses the practice of medicine and disciplines physicians for violating standards of professional conduct, it does not follow that the States are free to ignore the requirements of the Constitution of the United States or their own State Constitutions in either passing, implementing or enforcing their own laws.

In the State of Washington, as pointed out by the Petitioner in its Brief, the State of Washington enacted and relies upon, the Washington *Administrative Procedures Act*, Wash. Rev. Code 34.05 herein after referred to as the APA. In deciding Dr. Nguyen's case, the majority opinion, at Page 520, cited this APA for the proposition that the Washington State Supreme Court was given the authority by the Washington State Legislature to: "*grant relief from an Administrative agency's ruling if, among other things, the order is in violation of the constitution either on its face or as applied.* RCW 34.05.570(3)"

In this case the Washington State Supreme Court made such a decision pursuant to the APA.

It is also under this same APA that virtually any information can be used as evidence in physician disciplinary proceedings including second and third hand hearsay.

The Washington State Supreme Court made no error. It correctly followed the law set forth in *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979), *Mathews v. Eldridge*, 424 U.S. 319 (1976), cited in the Petitioner's Brief, as well as *Painter v. Abels*, 998 P.2d 931, 940 (Wyo. 2000); *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339 (Okla. 1996); *Washington Medical Disciplinary Board v. Johnston*, 99 Wn. 2d 466, 474, 663 P.2d 457 (1983).

The Majority opinion in the Washington State Supreme Court in *Nguyen v. Dept of Health*, 144 Wn. 2d 516 (Aug. 2001), recognized that the structure of the procedures which were established by statute and written by the Washington State Legislature were intended to guaranty procedural due process.

The Majority opinion however also recognized that the failing was not in the statutory structures themselves but in the dynamic of the human thinking of the members of an Agency, in this case the Medical Quality Assurance Commission which is charged with the duty of investigating, policing, disciplining, prosecuting, punishing and imposing penalties upon physicians it decides are guilty of unprofessional conduct; more significantly, this is done after determining these physicians are guilty of unprofessional conduct based upon the rules, regulations, and procedures authored by the Medical Quality Assurance Commission in cooperation with the Department of Health.

The Washington State Supreme Court recognized that changing the burden of proof rule in these quasi criminal proceedings from a preponderance of the evidence rule to

clear and convincing evidence rule would cause members of the Medical Quality Assurance Commission to be appropriately careful in their decision making given the potentially disastrous ramifications of these decisions, including loss of reputation, money, life style and respect, profession, and standing in the community.

Failure to enforce the clear and convincing rule would leave governmental power dangerously unfettered and allowed to hide behind a smoke screen that there are adequate statutory provisions to preserve due process. To tolerate this would be akin to walking down the main street of a Hollywood western movies set, looking at the facades of the buildings on the set and making the assumption that these were all complete buildings.

Due process protections must be substantive and not illusory.

In the context of this case it is vital to focus on the following realities:

(1) The Medical Quality Assurance Commission, working with its investigative arm, the Department of Health decided what the rules of procedure would be, (2) what rules would be followed when reviewing the physicians' conduct, (3) what rules would be followed when these entities are acting as police and/or investigators; actions which at times are and were carried out covertly, (5) what facts are and were sufficient upon which to base charges of misconduct, (6) when a case should be prosecuted, (7) whether the evidence is sufficient for a conviction, (8) what punishment should be imposed, including fines, suspension or revocation of license.

The Commission and the Department of Health have the power to enter a physicians office and conduct a surprise search, regardless of whether he has patients present or not.

The Commission does have the power to issue penalties, both in the forms of suspension of license and fines.

In the State of Washington, our Supreme Court has now said to these agencies, after reviewing their rules, procedures, conduct of hearings, and the manner in which they analyze and process the specific evidence as in the instant case, that they need to be more careful in prosecuting physicians.

Since the agency is making the rules, is prosecuting and deciding the case, a low level burden of proof such as a simple preponderance is insufficient to tell the finder of facts it must exercise caution.

The lack of rules regarding admissibility of evidence in administrative cases results in and did result in this case in the State's being able to present any kind of information as evidence regardless of evidentiary quality to convict a physician. This is particularly true when this occurs in the context of a proceeding governed by a simple preponderance rule that is applied especially where there are virtually no rules of evidence.

Further, the Petitioner argues that to require clear and convincing evidence would be an impairment of the State of Washington's ability to act as policemen, prosecutor, judge, jury and executioner, but it shows no real or practical way that its ability to enforce the laws of physician discipline would be impaired.

If the Petitioner's arguments are to be accepted, that there should be one rule for the entire country, why not make it a clear and convincing rule? However, before coming to that, what does the petitioner want? Does it want, one rule for the entire country, and then have the federal government take over the licensing and the policing of physicians?

**Regulation of the Practice of Medicine in Washington**

The respondent agrees with the matters set forth in this section of the Petitioner's Brief.

**Procedural History**

The Respondent agrees in large part with the statement set forth in this section of the Petitioner's Brief, except for the sentence beginning at the bottom of Page 7 of the Petitioner's Brief where the Petitioner stated that CPEP determined that Dr. Nguyen practiced medicine in a manner that created an unreasonable risk that patients ***may*** be harmed.

This expression: ***"may be harmed,"*** underscores the likelihood of an unfair conviction based on speculation if the simple preponderance rule is allowed to stand.

This disagreed with the testimony and assessment of Dr. Peterson, the Petitioner's own hired expert who reviewed Dr. Nguyen's files and Dr. Burdick's assessment as Preceptor and Dr. Miller's conclusions about the fairness of the structure established to monitor Dr. Nguyen.

The Petitioner's assessment in the first paragraph of Page 11 of its Brief said that the Washington Supreme

Court majority reasoned that the procedural safeguards established by the Washington State Legislature could not substitute for failure to impose the requisite minimum burden of proof which is specifically designed to impress the fact finder with the importance of the decision and thereby reduce the chance of error.

All the statutorily created structures in the world that carry the label procedural safeguards mean nothing when applied by the unfettered collective errant mind of a body of human beings who are given the power of being police, prosecutor, judge, jury and executioner, who have had the opportunity to convince themselves of guilt before all the evidence is presented at a hearing.

To argue that a "simple preponderance rule" applies in all civil cases, and should therefore apply in physician discipline cases is specious. In the "usual" civil case, such as a personal injury case, medical malpractice case, real estate case, or contract case, the situation is entirely different.

In civil cases of these types, there is an attorney who presents the case for the plaintiff, there is the attorney for the defendant who defends and there are jurors under the guidance of jury instructions issued by the Judge who decide the factual issues and a Judge guided by the rules of evidence.

In the alternative, a bench trial is decided by the Judge who makes a determination. However, in neither scenario is the fact finder the prosecutor. The collector of the facts or evidence is also separate from the finder of fact and the judge and the investigator do not take part in the decision of the case.

This is particularly true in a jury case especially where the fact finder is neither prosecutor nor executioner.

The Petitioner's analysis beginning in the second paragraph of Page 11, of its Brief when quoting from the dissenting opinion with approval, fails to recognize that the result of a professional disciplinary proceeding is no longer simply an economic loss.

In addition to the economic loss and the loss of reputation and the loss of standing the physician suffers in his or her own community, the disciplined physician must now be listed in the National Data Bank which is available to all.

The Petitioner's Brief also pointed out at Page 12, that there are "procedural safeguards." These are additional façades which hide the absence of real due process.

This begs the question and makes for a bizarre scenario given the fact that hearings conducted under the APA allow virtually any information to become evidence.

## RESPONDENT'S STATEMENT OF REASONS FOR NOT GRANTING PETITION

In its statement which began on Page 12 of its Brief, the Petitioner fails to set forth any reasons or explanations as to how the State would be impeded in prosecuting physicians for unprofessional conduct; rather it simply repeated the expression that the Washington State Supreme Court inflated a physicians interest in his or her

license into a liberty interest equivalent to a loss of liberty.

Requiring proof under the Clear and Convincing test does not impair the State. In the Majority opinion the Court discussed this thoroughly and the question as to how the State will be impaired in its disciplining of physicians if the Clear and Convincing Rule is used has never been answered by the State.

At the bottom of Page 12 of its Brief, the Petitioner argued that the State should have the freedom to develop a variety of solutions to problems and not be forced into a common mold.

The Petitioner wants that for the Washington State Medical Quality Assurance Commission and the Dept. of Health, but does not want that for the respective State Supreme Courts – this argument does not want to allow the State Supreme Courts in the respective States to be able to tell its own state agencies that they are violating the Constitution. This contravenes the *Addington* case *supra*.

The Petitioner wants unfettered plenary power to act unconstitutionally as it may so desire.

**1. There is No Conflict Among the States over the Burden of Proof Required by the Due Process Clause In a Medical Disciplinary Proceeding.**

The most likely answer in the other States using the clear and convincing standard is that their procedures do in fact appropriately safeguard due process. That is for each State Court to decide.

**2. The Washington Supreme Court's Decision Does Not Conflict with the U.S. Supreme Court's Due Process Analysis of the Private Interest Involved.**

Under this heading the Petitioner's Brief failed to recognize the essence of the Washington State Supreme Court's analysis that when dealing with matters which are not simply "civil" or not simply "criminal" but are "quasi-criminal" due process must have a different intensity in application and requires something different than either proof beyond a reasonable doubt or proof by a simple preponderance.

As the majority opinion pointed out, the impact of a decision of guilty must be examined. The impact in a physician discipline case is not simply a fine like in a traffic infraction, and at the other end of the scale it is not jail. However between these two poles is an impact of a different nature which the simple preponderance rule is not adequate to resolve in terms of due process.

**3. The Washington Supreme Court's Decision Does Not Fail to Recognize the State's Substantial Interest In Protecting the Lives and Health of Its Citizens.**

This is an argument designed to sell to the public by giving it an emotional appeal.

Those States which follow the Clear and Convincing rule for physicians seem not to have any enforcement problems, and the State of Washington is not impaired in its discipline of Attorneys when operating under the Clear and Convincing Rule.

**4. The Petition Does Not Raise an Important National Question.**

The Petitioner argued on Page 27, that to follow the clear and convincing rule is going to declare that twenty five jurisdictions are applying a constitutionally impermissible rule. This does not follow because there is no showing that due process is not satisfied by other means in those States such as better statutorily created procedural safeguards.

If the Constitution limits the states' freedom to act, who is better equipped to deal with that question than the Courts?

## CONCLUSION

The Opinion of the Washington State Supreme Court, which the Petitioner seeks to have overturned, gives recognition to the need for flexibility in applying due process principles. It recognizes that between the two poles of proof by a simple preponderance and proof beyond a reasonable doubt there lies a body of cases, the facts of which, demand due process principles be applied in the form of a burden of proof by clear and convincing evidence. The Washington State Supreme Court has also provided the guidelines for determining what facts dictate when clear and convincing evidence must be presented by the prosecuting party.

Respectfully submitted,

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January 31, 2002